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Millennium Approaches: The Future of the Voting Rights Act After *Shaw*, *De Grandy*, and *Holder*

by
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"It's all gone too far . . . we should stop somehow, go back."[1]

Introduction

In 1993 and 1994, the Supreme Court decided three voting rights cases with potentially serious impact on minority representation and the way we think about voting rights.[2] In *Shaw v. Reno*,[3] the Court held that race-based districting is subject to strict scrutiny under the Fourteenth Amendment when it results in geographically peculiar districts. In an opinion by Justice O'Connor, the Court saw such race-based districting as "an effort to segregate voters into separate voting districts because of their race," and held that such a practice might violate the Equal Protection Clause.[4]

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1. TONY KUSHNER, ANGELS IN AMERICA, PART TWO: PERESTROIKA, act 2, sc. 2 (1992).

2. In June, 1995, as this article was going to press, the Supreme Court decided yet another voting rights case, Miller v. Johnson, 115 S. Ct. 2475 (1995). The *Miller* case does not change the basic thrust of my analysis. Wherever possible, however, I have tried to note where the *Miller* decision sheds additional light one way or another. I have not attempted a full treatment of that case, nor its companion case, United States v. Hays, 115 S. Ct. 2431 (1995) in this piece.

3. 113 S. Ct. 2816 (1993).

4. *Id.* at 2832. The Court did not find such districts per se illegal. Rather, the Court held that race-based districting is subject to strict scrutiny. Thus, a "majority-minority" district could be upheld if it were shown either that the district was not "an effort to segregate voters into separate voting districts because of their race," or that, even if it was, such separation was "narrowly tailored to further a compelling governmental interest." *Id.* On remand, the district court in *Shaw* upheld the race-based district, finding that it was, indeed, narrowly tailored to further the state's compelling interest in eliminating vestiges of

In *Johnson v. De Grandy*,[5] while upholding a race-based districting plan as comporting with the Voting Rights Act, the Court held that the Voting Rights Act does not require that minority representation be maximized. Nor, the Court added, does it provide a "safe harbor" against vote-dilution claims for districting that reflects the proportion of a minority group in the population.[6] In a concurring opinion, Justice Kennedy agreed that the Voting Rights Act precedents permitted, indeed required, some forms of race-based districting, but suggested that for that reason, the Act might be unconstitutional.[7] Finally, in *Holder v. Hall*,[8] the Court held that section 2 of the Voting Rights Act could not be used to challenge the size of a local government, when governmental size was alleged to be dilutive of minority voting strength, because such a challenge would require the Court to address the question of what the appropriate voting strength of the minority ought to be.[9] Justice Thomas, joined by Justice Scalia, concurred in a 29-page manifesto calling for a complete revision of the court's voting rights jurisprudence and the elimination of all forms of race-based districting.[10]

When *Shaw* was decided, it was perhaps possible to believe that the case was an anomaly, its significance limited to truly awkward districts, and that it would have no serious impact on race-based districting.[11] But with the addition of the *Holder* and *De Grandy* decisions, it

racial discrimination in North Carolina. Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994). On June 29, 1995, the Supreme Court noted probable jurisdiction in the appeal from this decision. 115 S. Ct. 2639 (1995).

5. 114 S. Ct. 2647 (1994).

6. *Id.* at 2659-60.

7. Kennedy warns:

> As a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions. . . . Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.

De Grandy, 114 S.Ct. 2647, 2666-67. Kennedy stopped short in his constitutional analysis in *De Grandy* because "no constitutional claims were brought here, and the Court's opinion does not address any constitutional issues." *Id.* at 2667.

8. 114 S. Ct. 2581 (1994).

9. *Id.* at 2588.

10. *Id.* at 2591-2619.

11. For example, Richard Pildes and Richard Niemi argued that "*Shaw* is best read as an exceptional doctrine for aberrational contexts rather than as a prelude to a sweeping constitutional condemnation of race-conscious redistricting." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 495 (1993). Of course,

is now clear that this triumvirate is the beginning of a wholesale re-examination of race-based districting, with tremendous significance for the future of voting rights and minority representation. Indeed, these cases may well sound the death knell for race-based districting.[12]

In its haste to re-examine race-based districting, however, the Court has overlooked the serious problems with so-called race-neutral districting that were manifest in the 1960s and 1970s, and to which race-based districting responded. As the pendulum begins to swing back, there is a real danger that the Court will forget the lessons of the 1960s and 1970s as it attempts to address the problems of the 1990s. A thorough examination of both race-based and race-neutral districting, however, reveals that neither one satisfactorily addresses the problems of minority representation. Although commentators have noted the inadequacy of both race-based and race-neutral districting,[13] voting rights advocates have continued to focus on race-based districting as a solution that, while not perfect, is at least readily achievable.[14]

As the Supreme Court threatens to curtail, or put an end to, race-based districting, however, it becomes important to shift focus. To do so, however, requires an understanding of what achieving minority

Pildes and Niemi were writing before *Holder* and *De Grandy* were decided, and their view was not unreasonable under the circumstances at the time.

12. The court's recent decision in Miller v. Johnson, 115 S. Ct. 2475 (1995), confirms that *Shaw*'s reach is not limited to bizarrely-shaped districts. Rather, the court held in *Miller* that a district need not be "bizarre on its face before there is a constitutional violation." 115 S. Ct. at 2486.

13. *See, e.g.*, Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988) (arguing that section 2 of Voting Rights Act could and should be used to produce participational, as well as representational, benefits for minority voters); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) (arguing that proportionate interest representation does not address all defects in black electoral success theory); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989) (calling on courts to be creative in developing theories of liability under Voting Rights Act that recognize that minority vote dilution is not always simply a product of at-large as opposed to district-based elections).

14. For example, following the 1990 census, voting-rights advocates in Georgia focused their efforts on obtaining as many "minority-majority" districts as possible in the ensuing reapportionment. *See* Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994). Similarly, the Florida plaintiffs in Johnson v. De Grandy, 114 S. Ct. 2647, 2652-53 (1994), sought to maximize the number of districts they controlled, as did the plaintiffs in *Holder*, 114 S. Ct. 2581, 2584-85, who were seeking to expand the number of county commissioners so that, with appropriate districting, African-American voters could control one seat. *See also* Guinier, *supra* note 13, at 1093-99 (describing the evolution in strategy among voting-rights advocates).

representation means, and an understanding of the different conceptions of representation that have served as the basis for race-neutral and race-based districting. It is also necessary to understand the paradox of districting, what I call the "districting conundrum," that makes race-based districting both necessary and impractical. Armed with this understanding, we can map out a new strategy for achieving minority—and majority—representation in a world where the option of race-based districting is rapidly disappearing.

In this Article, I will attempt to revisit and reconceptualize the Court's voting rights jurisprudence in terms of the districting conundrum and theories of representation. In Part I, I will define the districting conundrum which I believe underlies all districting questions. In Part II, I will analyze the meaning of representation, focusing on the individual or "race-neutral" approach to representation and its limitations. In Part III, I will trace the emergence of a communal, or race-based, approach to representation in the Supreme Court's voting rights jurisprudence and in the Voting Rights Act. I will also discuss the problems of communal representation that have emerged since its adoption. In Part IV, I will examine the *Shaw, De Grandy,* and *Holder* decisions and analyze the Court's attempts to deal with the problems of communal representation. Additionally, I will take issue with Justice Thomas's suggestion that the way to deal with these problems is to return to a pre-1969 vision of representation, and suggest an alternative way out of the Court's current dilemma, through some form of proportional representation.

I. The Districting Conundrum

A. Time to Turn Back?

In Tony Kushner's Pulitzer Prize-winning play, *Angels in America,* Kushner portrays Heaven as deeply reactionary, threatened by the human tendency to move, change, travel, progress, and imagine. As the title character—an Angel who visits New York—explains, humanity's relentless motion not only creates tremors in Heaven but has driven God himself away. The Angel's mission is to find a prophet who will tell the human race to stop moving forward. Explaining her mission, she commands, "Turn back. Undo."[15] Kushner's message, ultimately, is that no such turning back is possible. Twice he writes, "The world only spins forward."[16] Kushner recognizes, how-

15. KUSHNER, *supra* note 1, sc. 2.
16. *Id.*

ever, that the processes of change and forward movement can be terrifying, in part because the destination remains unknown.[17]

Like Kushner's Angel, Justice Clarence Thomas in his concurring opinion in *Holder v. Hall*,[18] issues a call to turn back and undo. Urging the court to reverse 25 years of Voting Rights Act[19] jurisprudence, Thomas exhorts: "In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day."[20] Thomas locates the Court's "wrong turn" in the 1969 case *Allen v. Board of Supervisors*,[21] and asks the Court to overrule *Allen* and all its progeny.[22] Thus Thomas, in my view, aligns himself firmly with the forces of reaction which, like the Angel in Kushner's play, find the process of continuing forward too terrifying and instead seek the comfort of going back.

Although Thomas's reactionary vision in *Holder* did not command a majority and, indeed, was shared by only one other Justice,[23] the *Holder* case, along with *De Grandy*,[24] decided the same day, and *Shaw*,[25] decided the previous Term, is nonetheless a watershed in Voting Rights Act jurisprudence. Together, these cases reveal a Court that is increasingly uncomfortable with its voting rights decisions. Unnerved by the prospect that expanded application of the Voting Rights Act would lead to "political apartheid"[26] and the "racial balkanization of the Nation,"[27] the Court seems poised to retreat to a considerably weaker vision of racial equality in voting, and possibly even to declare substantial portions of the Voting Rights Act unconstitutional. As *Shaw, Holder,* and *De Grandy* demonstrate, moving forward would force the Court, and the nation, to confront fundamental questions

17. As the World's Oldest Living Bolshevik puts it in the Prologue to *Perestroika*, "If the snake sheds his skin before a new skin is ready, naked he will be in the world, prey to the forces of chaos. Without his skin he will be dismantled, lose coherence and die. Have you, my little serpents, a new skin . . . ? Then we dare not, we *cannot*, we MUST NOT move ahead!" *Id.* at act 1, sc. 1.

18. 114 S. Ct. at 2591.

19. 42 U.S.C. §§ 1971, 1973 to 1973aa-6 (1994).

20. 114 S. Ct. at 2618.

21. 393 U.S. 544 (1969).

22. 114 S. Ct. at 2593-97.

23. Only Justice Scalia joined in Thomas's concurrence. In two separate opinions, Justices Kennedy, Rehnquist, and O'Connor reached the same result in the case, but none of these three Justices adopted Thomas's reasoning, nor did they seek, as does Thomas, to reverse virtually every Voting Rights Act case since 1969.

24. 114 S. Ct. at 2647.

25. 113 S. Ct. at 2816.

26. *Id.* at 2827.

27. *Holder*, 114 S. Ct. at 2592 (Thomas, J., concurring).

about voting rights and representation, as well as racial and ethnic divisions. Moreover, confronting these questions might force the Court to entertain new solutions, with unknown consequences. The inclination to "turn back" in order to avoid these difficult questions is thus understandable. But once asked, these questions about voting and representation cannot be so easily avoided. Reversing twenty-five years of case law will not eradicate the underlying issues that have led us to this point.

The simplest way to avoid dealing with a question is to ignore it, or to fail to recognize it. To understand what is at stake in the *Shaw, De Grandy,* and *Holder* cases, it is helpful to articulate clearly what questions these decisions implicate. Only if we know what questions we are trying to answer can we assess the opinions in these cases.

B. Voting Strength

The fundamental issue underlying the voting rights cases is: How should representation be allocated? This turns out not to be one question, but rather a series of related questions that I call the districting conundrum, which can be illustrated with the following hypothetical.

Suppose there is a jurisdiction with a total population of one million voters, 70% of whom are white and 30% of whom are African-American. Suppose further that these one million voters are to choose ten representatives, and that they do so in single-member districts, each of which consists of 100,000 voters. As a matter of mathematics, the districts can be arranged so that African-Americans are in the majority, and thus are able to decide the outcome, in zero, one, two, three, four, or five districts.[28] African-Americans will be a majority in zero districts if every district, like the jurisdiction as a whole, is 70% white and 30% African-American; in one district if that district is 25% white and 75% African-American, with the other nine districts 75% white and 25% African-American; in two districts if those two

28. We could just as easily say that the districts can be arranged so that whites are in the majority, and thus are able to decide the outcome, in 5, 6, 7, 8, 9, or 10 districts. In fact, this latter formulation has the virtue of clarifying that this is not simply a problem of minority representation. The formulation in the text, written as it is from the point of view of the white majority, may carry with it an implicit assumption, which I do not intend, that it is the prerogative of the majority to decide how much representation it will "give" to the minority. Because, however, most of the districting cases speak in terms of the number of "majority-minority" districts to be created, rather than the number of "majority-majority" districts, I will continue to frame the question in terms of the number of districts controlled by the minority.

are each 46% white and 54% African-American, with the remaining eight districts each 76% white and 24% African-American; in three districts each of which is 21% white and 79% African-American, with the remaining seven districts 91% white and 9% African-American; in four districts if each of those four is 35.5% white and 64.5% African-American, with the remaining six districts 93% white and 7% African-American; and in five districts if half the districts are split 49% white and 51% African-American, with the remaining half 91% white and 9% African-American. In each example, there are a total of 700,000 white voters and a total of 300,000 black voters. These outcomes are displayed in Table 1.[29]

One set of questions arises immediately: Which is the correct result? Does it make a difference how the result was reached? Most important, does the Fifteenth Amendment or the Voting Rights Act have anything to say about these questions?[30]

However, there is a second, more fundamental set of questions that must also be addressed. Should we even concern ourselves with the results of the districting conundrum? Do these results mean anything, and should we—should courts, legislatures, the Justice Department, or society as a whole—try to control the outcome?

With respect to the first set of questions, it is useful to define some terminology describing some of the possible results of the districting conundrum. As shown on the chart, in the circumstance I have described, the minority could, in theory, control one, two, three, four, or five seats. Five is the maximum number of seats that the minority can control here. In a winner-take-all election, it requires 50,001 votes to control a seat. Controlling five seats requires a total of 250,005 votes—50,001 in each of five districts. With a total minority population of 300,000, there are more than enough votes to meet this requirement. Controlling six seats would require 6 times 50,001 or 300,006 votes—six more than the total minority population in the entire jurisdiction.

29. *See* DOUGLAS AMY, REAL CHOICES, NEW VOICES 40 (1993). I have based my figures on Professor Amy's chart showing possible allocation of seats between Democrats and Republicans when Democrats are 58% of the population and Republicans 42%. Because racial minorities are generally a smaller minority than the Democrat-Republican split hypothesized, I have adjusted the numbers, and at the same have carried the analysis further to show that every number of seats from 0 to 5 is a possible outcome.

30. The problem shows many variations: What if there are three groups, not two? *See* Johnson v. De Grandy, 114 S. Ct. 2647 (1994). What if there are no districts at all? *See* Holder v. Hall, 114 S. Ct. 2581 (1994). What if the voting is at large? Although each variation poses distinctive questions, an overall theory of how to approach the basic problem would go a long way to solving the special problems that arise in particular cases.

Table 1

	Example A		Example B		Example C		Example D		Example E		Example F	
	White	Black	White	Black	White	Black	White	Black	White	Black	White	Black
1st District	70,000	30,000	25,000	75,000	46,000	54,000	21,000	79,000	35,500	64,500	49,000	51,000
2nd District	70,000	30,000	75,000	25,000	46,000	54,000	21,000	79,000	35,500	64,500	49,000	51,000
3rd District	70,000	30,000	75,000	25,000	76,000	24,000	21,000	79,000	35,500	64,500	49,000	51,000
4th District	70,000	30,000	75,000	25,000	76,000	24,000	91,000	9,000	35,500	64,500	49,000	51,000
5th District	70,000	30,000	75,000	25,000	76,000	24,000	91,000	9,000	93,000	7,000	49,000	51,000
6th District	70,000	30,000	75,000	25,000	76,000	24,000	91,000	9,000	93,000	7,000	91,000	9,000
7th District	70,000	30,000	75,000	25,000	76,000	24,000	91,000	9,000	93,000	7,000	91,000	9,000
8th District	70,000	30,000	75,000	25,000	76,000	24,000	91,000	9,000	93,000	7,000	91,000	9,000
9th District	70,000	30,000	75,000	25,000	76,000	24,000	91,000	9,000	93,000	7,000	91,000	9,000
10th District	70,000	30,000	75,000	25,000	76,000	24,000	91,000	9,000	93,000	7,000	91,000	9,000
Vote Totals	700,000	300,000	700,000	300,000	700,000	300,000	700,000	300,000	700,000	300,000	700,000	300,000
Seat Allocation	10	0	9	1	8	2	7	3	6	4	5	5

In any districting problem, the maximum number of seats that any group can control can be calculated by taking the whole number portion of the result of dividing the total population of that group in the jurisdiction as a whole *(P)*, by half the number of voters *(V)* in each district plus one: $\frac{P}{\frac{1}{2}V+1}$. Here, $\frac{300{,}000}{50{,}000+1} = 5$ with a remainder of 49,995, indicating that five is the maximum number of seats that can be controlled by this group. The formula also tells us that the majority has more than enough votes to control all ten seats, and indeed, could control up to thirteen: $\frac{700{,}000}{50{,}000+1} = 13$ with a remainder of 49,987.

The result of this formula for any group, whether in the majority or in the minority, yields maximum representation. Thus, when we speak of districting with a goal of maximization, we are speaking of districting to achieve the most number of seats possible, as calculated by this formula.[31]

We may also district so that the proportion of seats held by a particular group matches the proportion of the population comprised by that group. In Table 1, this would be the result found in Example D, where African-Americans are assumed to be 30% of the population and hold 30% of the seats. This situation can be described mathematically as follows: $\frac{S_g}{S_t} = \frac{G}{T}$ where S_g is the number of seats held by the group, S_t is the total number of seats, G is the number of members in the group and T is the total population of the jurisdiction. This result is sometimes referred to as "proportional representation," but that is a misnomer. As I shall discuss below, proportional representation historically has referred to systems of voting in which representation is proportional to the way the ballots have actually been cast—that is, to systems that are not "winner-take-all" elections. This is altogether different from choosing the result from Table 1 that matches demographic proportions. For this reason, I shall use the term "proportional representation" in its historic sense and refer to

31. It is also possible to define a formula for minimization—that is, a formula showing the minimum number of seats that a group can control. This formula would be $S - \frac{T-P}{\frac{1}{2}V+1}$ where S is the total number of seats available, T is the total population in the jurisdiction, P is the population of the group in question, and V is the number of voters in each district and the fraction is understood to refer to the whole number portion of the quotient only. This would confirm that the 700,000-member majority will have *at least* 5 seats no matter how we district, because (1,000,000 – 700,000) ÷ 50,001 yields a whole number portion of 5, and 10, the total number of seats available, minus 5 = 5. Districting specifically designed to *minimize* representation, however, would seem problematic and it is unlikely that one would see that expressed as the stated goal.

the result shown in Example D and represented by the above formula as "demographic proportionality."

I wish to turn now to the second set of questions posed by the districting conundrum—those that ask whether we ought to attempt to answer the conundrum at all. Because I find these questions to be so significant, I want to be clear about what they mean. What does it mean to say that we are concerned about the districting conundrum? Addressing or accepting the districting conundrum requires that we approach representation in a planned and centralized way—that someone *decide* how much representation a group ought to have. Such an approach is substantive and result-oriented: legislatures and courts should judge the fairness of a districting process by the result it produces. Not caring about or rejecting the districting conundrum means adopting a procedural approach to districting, with a laissez-faire approach to the consequences of districting. It means that legislatures and courts make no effort to control a group's representation, which eliminates the burden of deciding how much representation each group ought to have. It means that we judge the fairness of the districting process not by the results, but rather by the rules which govern the process.

Addressing the districting conundrum corresponds to the use of "race-based" districting, districting drawn to produce (or to avoid) a particular outcome to the districting conundrum.[32] Rejecting the districting conundrum, on the other hand, corresponds to "race-neutral" districting, which I shall use to refer to districting that is not evaluated with reference to its ability to produce (or avoid) any particular result, but only with reference to whether the process used is believed to be "fair."

It might be argued that "race-neutral" districting is any districting that was not drawn with the intention of producing a particular result to the districting conundrum, but I believe that such a definition would not capture the essence of the conundrum. The conundrum is about how we *evaluate* districting, not about how we draw it. At the heart of the districting conundrum is the realization that any districting plan, no matter how it was drawn or what was intended, will produce one of the results on a chart like Table 1. This insight forces us to decide whether we will look at this effect. The use of the term "race-neutral" districting to refer to districting drawn without

32. It is necessary to emphasize the phrase "or avoid" in this formulation, in order to recognize that a plan drawn to ensure that the answer is *not* zero is still a race-based plan, even if no particular answer other than "not zero" is chosen.

racial animus obscures this question by focusing on the mental state of the drafter and the process used, rather than on the choice a court or legislator must make about whether to look beyond that process to the actual effect of the plan. Thus, the critical feature of a "race-neutral" scheme is not what the individual who drew it had in mind, but rather whether we will choose to examine the results that have been achieved from a race-based orientation, or whether we will limit our examination to an evaluation of the process.

I believe that *Shaw, Holder,* and *De Grandy* can best be understood as attempts to grapple with one aspect or another of this problem. An examination of these cases confirms that the two sets of inquiries I have outlined—should we address the districting conundrum, and if we do, what is the correct answer to it—are the central issues confronting the Court.

Of course, these issues do not arise in a vacuum. The Fifteenth Amendment of the U.S. Constitution and the Voting Rights Act provide the basic sources of law against which these questions are measured. The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[33] Section 2 of the Voting Rights Act (the "Act") provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[34]

Section 5 of the Act requires certain covered jurisdictions to obtain preclearance of changes to "any voting qualification or prerequi-

33. U.S. CONST. amend. XV.

34. 42 U.S.C. § 1973. The protections of the Voting Rights Act are extended to language minorities by 42 U.S.C. § 1973b(f)(2) (1994).

site to voting, or standard, practice, or procedure with respect to voting" to ensure that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[35]

Districting has been recognized as a "standard, practice or procedure" within the meaning of the Voting Rights Act.[36] Accordingly, the Justice Department and the courts have required states and their subdivisions to draw their districts in a way that does not violate the Act, and that does not abridge voting rights within the meaning of the Fifteenth Amendment. One mechanism that has been used to ensure that minority vote is not abridged is the "majority-minority" district—an electoral district in which members of a minority group are in the majority, and thus have the opportunity to elect a representative of their choice.

In applying the Voting Rights Act, the courts speak of "voting strength," and look to be sure that districting schemes are not "dilutive" of African-American voting strength. It is useful to note at this point that "voting strength" corresponds to the allocation of representation in the districting conundrum. Once we begin to focus on the voting strength of a particular group, we have entered into the districting conundrum—we have begun to ask how many seats the group should control.[37] The Supreme Court first adopted this concept of voting strength in 1969 in *Allen v. Board of Elections.* [38] *Allen* thus does represent a turning point in the Court's jurisprudence, in that *Allen* was the point at which the Court first turned from a position of

35. 42 U.S.C. § 1973c (1994).

36. *See, e.g.,* Allen v. Board of Supervisors, 393 U.S. 544, 569 (1969) (applying the Voting Rights Act to change from single-member to multimember districts); 28 C.F.R. § 51.13 (1994) (subjecting redistricting to § 5 preclearance).

37. Other commentators have pointed out that the concept of vote dilution employed in *Allen* requires some notion of what the "proper" voting strength of a group "ought" to be—that is, how many seats "ought" a group to control? *See, e.g.,* Abrams, *supra* note 13, at 518 (discussing "baseline" standard); Karlan, *supra* note 13, at 232 (discussing cumulative voting); *see also* Thornburg v. Gingles, 478 U.S. 30, 88 (1986) (noting that term "vote dilution" suggests a norm against which to weigh whether dilution has occurred). Indeed, this insight forms the basis for Justice Kennedy's and Justice O'Connor's opinions in *Holder,* and it is not my purpose to suggest that they were wrong in this regard. Nonetheless, even commentary that recognizes this problem has tended to gloss over its implications. Thus, while they recognize the importance to vote-dilution analysis of the question raised by the districting conundrum, neither Professor Karlan nor Professor Abrams address whether that question can be answered or how we would go about deciding what the answer should be.

38. 393 U.S. 544 (1969).

ignoring the districting conundrum to a position of recognizing and attempting to answer it.

Shaw, De Grandy, and *Holder* all show the Court increasingly uncomfortable with its efforts since *Allen* to address the districting conundrum. The *Shaw* case is nothing more than a rephrasing of the basic districting conundrum: Should we care—and therefore try to determine—how many districts are controlled by minority voters, even if it makes our districts look funny? *Holder* raises another variation of the districting conundrum, one that asks: If answering the districting conundrum is too hard, should we rethink the question of addressing the conundrum in the first place? *De Grandy* also asks a slightly different question of the districting conundrum: If we accept that the districting conundrum matters, what is the correct answer?

I will postpone full discussion of these cases until Part IV, but it is important to note that in each of these cases, at least some of the justices show themselves inclined to abandon the districting conundrum. Some of the justices seems to want to abandon it on principle, while others seem ready to abandon it because of the difficulty of answering it in the variety of situations in which it has begun to arise. Rejecting the districting conundrum and limiting the Voting Rights Act to questions of ballot access and counting, as Justice Thomas suggests,[39] would, however, permit the most blatant types of racist manipulation. For if courts adopt the view that the results of the districting conundrum—how many seats should the minority get—do not matter, there is no reason to believe that local authorities will similarly turn a blind eye to this question. If we cannot examine the results of the districting conundrum, there is nothing to stop our hypothetical jurisdiction from changing its voting system, abandoning district voting altogether in favor of at-large voting for all ten seats, which would insure that the number of seats chosen by members of the minority group is zero.[40] Under Thomas's interpretation of the Voting Rights Act, this would be permissible even if local officials in our hypothetical jurisdiction made this change for the sole purpose of ensuring that minority voters would have no say in the election.[41]

39. Holder v. Hall, 114 S. Ct. 2581, 2618 (1994) (Thomas, J., dissenting).

40. This was precisely the change at issue in the *Allen* case, and it was to deal with this kind of manipulation that the Court turned toward a recognition of race-based districting in the first place.

41. Although it might seem that a discriminatory motive itself should be sufficient to invalidate such a districting plan, I am not at all sure that would be the case. The problem would be that without a theory of the proper voting strength of the group in question, it could be argued that the discriminatory motive had in fact caused no harm. That is, if

Thus, if race-based districting leads to "political apartheid" and "balkanization," so-called "race-neutral" districting can lead to deliberate racist exclusion or, at the very least, to unintentional, but unchallengeable, exclusion and frustration.

Unfortunately, the Court is not entirely wrong in identifying problems that arise once we actually attempt the answer the conundrum. I believe that we can neither ignore the districting conundrum *nor* answer it. This may seem paradoxical, in view of my contention that ignoring the districting conundrum or answering it are the only two possible responses. Nonetheless, I believe that the history of voting rights cases leading up to *Allen* demonstrates why we cannot ignore the districting conundrum, while an examination of the cases since *Allen* illustrates why we cannot answer it either. Confronted with this paradox, we need to find another way around the districting conundrum.

II. Representation

A. The Meaning of Representation

The districting conundrum is about how representatives are to be chosen. To determine whether we should care how many seats a particular group can control, we need to understand who, or what, is being represented. Put another way, What is the unit of representation? By "unit of representation," I mean whatever entity we conceive of to be the represented party. The unit of representation tells us on whose behalf the representative speaks. If we understand who or what is being represented, then the question how, and by whom, representatives are to be chosen may become clearer.

Much of the scholarship about representation has focused on what a representative does and what it means to be a representative.

there is no right to elect any particular number of representatives, then it becomes difficult to articulate how any districting scheme, no matter what the subjective intent of those who drew it, has abridged anyone's right to vote. That is certainly what Justice Thomas argues in *Holder* and it does appear to be a logical extension of so-called race-neutral districting.

On the other hand, the intention to divide people along racial lines was sufficient to bring the districting in *Shaw* under the scrutiny of the Court. In addition, in City of Richmond v. United States, 422 U.S. 358 (1975), the Court held that an annexation that did not, in fact, have an adverse effect on minority voting rights might still be reversed if it were enacted solely for a discriminatory motive. It should be noted, however, the discriminatory motive in *City of Richmond* failed to produce a discriminatory result because the electoral structure in fact gave sufficient voting strength to the black community, not because it sought to deprive African-Americans of something to which they had no right in the first place. Whether motive without harm would be sufficient in the latter circumstance is unclear.

In *The Concept of Representation,*[42] Hanna Fenichel Pitkin analyzes what has been written about representation in order to come to an understanding of what it means. She identifies different conceptions of representation, including authorization,[43] accountability,[44] "standing for" representation,[45] and "acting for" representation.[46] In doing so, however, Pitkin is interested in one particular set of questions. She argues that representation rests on a fundamental paradox, the notion that "something not literally present is considered as present in a nonliteral sense."[47] For Pitkin, then, the interesting questions about representation are "in what" sense and "from whose perspective is representation to be considered?"[48] Moreover, Pitkin argues that these questions cannot be answered simply by looking at whether people feel themselves to be represented, but in terms of "when should men feel that they are represented" and "what would count as evidence that they are represented?"[49] In essence, Pitkin turns to various theories about how representatives ought to behave in order to determine when people should feel represented.

In viewing theories of representation through this particular lens, however, Pitkin and her predecessors have bypassed an issue that is perhaps more fundamental, namely, the question of who or what is represented in the first place. In asking "when should men feel that

42. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

43. According to Pitkin, "the basic features of the authorization view are these: a representative is someone who has been authorized to act. This means that he has been given a right to act which he did not have before, while the represented becomes responsible for the consequences of that action as if he had done it himself." *Id.* at 38-39.

44. Pitkin describes the accountability theory of representation as one in which "a representative is someone who is to be held to account, who will have to answer to another for what he does. The man or men to whom he must eventually account are those whom he represents." *Id.* at 55. Thus, what makes someone a representative in this view is that she is "subject to reelection or removal at the end of her term," when she must account for what she has done. *Id.* at 56.

45. Pitkin defines two kinds of "standing for" representation. A descriptive notion of "standing for" representation refers to a notion of representation in which representation depends on "the representative's characteristics, on what he *is* or is *like,* on being something rather than doing something. The representative does not act for others; he 'stands for' them, by virtue of correspondence or connection between them, a resemblance or reflection." *Id.* at 61. A symbolic kind of "standing for" representation, however, involves a representative whose connection to that which she stands for is symbolic; she does not resemble what she stands for, she symbolizes it. *Id.* at 92-93.

46. An "acting for" theory of representation is a theory about a representative's actions for, in behalf of, in the interest of, others. This view looks at what the representative actually does, whose benefits she promotes. *Id.* at 113-16.

47. *Id.* at 9.

48. *Id.*

49. *Id.*

they are represented," we have already assumed that it is "men"—that is, individuals—that ought to feel this way.[50]

But that need not be so. In theory, the unit of representation could be many other things besides the individual.[51] In some situations—a religious or educational context, perhaps—we might choose representation by family; in a corporation, the unit of representation is the share; a state or county commission might look for input from a representative of each town;[52] in a university, we might expect to see each department, or each school, represented,[53] just as a larger educational organization might act through a representative from each school or university.[54] A coalition of organizations may include a representative from each organization. An entire nation can be the represented unit, whether in the United Nations or at a meeting of the G-7.

50. Indeed, Pitkin seems to assume that the answer to her question "when ought men to feel represented" turns primarily, if not solely, on the conduct of the representative—whether the representative acts pursuant to authority, is accountable, is similar or symbolic enough to stand for, or acts for the represented. What I propose here is to shift the focus from the representative to the represented, and then to ask how the represented ought to choose their representative.

51. Theories of representation have changed over time. In its earliest form, the membership of the English Parliament "was one of representatives of classes," or Estates. *See* ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT 73 (Da Capo Press Reprint Edition 1971) (1930). The Estates General in France, too, consisted of representatives of the three estates recognized in society, the clergy, the nobility, and the common people. *Id.* at 60. Such representatives represented not individual people, but a particular class of persons. Later, representation in England was by shire or town, that is, it was the town or shire (rather than the individuals who resided there) that was actually represented in Parliament. *Id.* at 64, 72. Indeed, according to Luce, the term "Commons" originated as an abbreviation of the Latin "communitatas" or "communities." *Id.* at 76.

Similarly, in Massachusetts, beginning in the 17th century and continuing until the middle of the 19th century, the town, as a corporate body, was the unit of representation in the legislature or General Court. *See* J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 33-54 (1966). Gradually, however, in America, the notion of a town or county or other community as the unit of representation gave way to the idea of the individual as the unit of representation. The constituency of a congressman or state legislator is no longer conceived to be a town, a county or a state as a corporate body, but rather the individuals who reside in that representative's district. In the legislative body, the representative speaks for and represents those *individuals,* and not some other corporate entity.

52. *See* Abate v. Mundt, 403 U.S. 182 (1971) (considering constitutionality of county reapportionment scheme).

53. Thus, we would not be surprised to find a university-wide body consisting of representatives from each school in the university.

54. Each member law school, for example, sends a delegate to meetings of the Association of American Law Schools.

Indeed, the individual is not the only unit of representation that has been recognized in this country. The U.S. Senate, where representation is by state, is perhaps the most famous example. Prior to the mid-1960s, representation on a county basis within state legislatures was widespread,[55] and as recently as 1983 the Supreme Court upheld county-based representation in Wyoming despite great divergences in population.[56] Towns, as political subdivisions within counties, have also provided a basis for representation.[57] Representation based on land ownership and apportioned according to the number of acres owned has also been upheld.[58] More recently, the Supreme Court has adopted, at least in part, the notion that racial and language groups can sometimes be the unit of representation.[59]

To address questions of districting and allocation of representation, we must have a clear idea of who or what it is we believe ought to be represented. We are not going to be able to agree on how many delegates each country will send to the United Nations, for example, without addressing the question of the unit of representation. So long as one country believes that the unit ought to be the individual (or the province, etc.) and others believe that the unit ought to be the nation, we are not going to be able to allocate representation in a systematic way. The same is true for legislative districting—without a clear sense of who or what is being represented, we will not be able to make coherent choices about how that representation should be allocated.

Once we recognize that the unit of representation is not necessarily a foregone conclusion, it becomes clear that Pitkin's question—when ought men to feel represented—is inadequate. Instead, we should ask: Who or what is represented, and who or what *ought* to be

55. The opinions in both *Baker v. Carr* and *Reynolds v. Sims* document this widespread use of representation by county in effect at the time these cases were decided. *See Baker,* 369 U.S. 186, 189 n.4 (1962); *Reynolds,* 377 U.S. 533, 589 (Harlan, J., dissenting).

56. Brown v. Thomson, 462 U.S. 835 (1983). The Court in *Brown* found that the deviation from "one person, one vote" principles, which it recognized was not minor, was justified by Wyoming's long-standing and good-faith commitment to preserving the integrity of its political subdivisions.

57. *See* Abate v. Mundt, 403 U.S. 182 (1970) (deviations from "one person, one vote" were acceptable when state sought to preserve the integrity of towns, which for more than a century had been the basis for representation in county government).

58. Ball v. James, 451 U.S. 355 (1981). The voting scheme was upheld because the water reclamation district board so elected did not exercise sufficient governmental powers to require compliance with "one person, one vote." *Ball* thus confirms that the appropriateness of any particular unit of representation turns on the particular circumstances and the body in which representation is being sought.

59. *Allen, Gingles,* and *De Grandy* are all examples of this. *See infra* Parts III and IV.C.

represented? Is the unit of representation appropriate to the circumstances, and what are the consequences of using that level of representation, rather than another one?[60] Does the unit of representation we have chosen correspond to the way we think and behave?

We need not, however, start from scratch here. Modern American case law recognizes two main approaches to the question of the unit of representation:[61] the individual approach, using the individual as the basic unit of representation,[62] and the communal approach, using a racial or ethnic group as the unit of representation.[63]

Moreover, there is a correspondence between these approaches to representation and the districting conundrum. The individual theory of representation corresponds to the position that the districting conundrum doesn't matter. After all, the districting conundrum asks how much representation shall be allocated to a group. If individuals, not groups, are what is represented, then this question will not be a meaningful one. We shouldn't care whether African-Americans are in the majority in zero, one, two, three, four, or five districts if African-Americans, or whites, for that matter, are not a relevant category. Similarly, a group theory of representation corresponds to the notion that we should address the districting conundrum. If representation

60. Obviously, traditional representation theories address these questions in another form. For clearly one can ask whether individuals ought to feel represented through the mediating structure of the nation. I believe, however, that by asking the question in this way, the fundamental choice of the basis of representation is obscured.

61. Although representation has traditionally been allocated geographically, I argue, *infra,* that geographic representation, at least in modern times, is nothing more than a method for implementing individual representation. It is true that at one time geographically-cohesive communities formed the unit of representation, but I believe that this type of representation is best understood as representation by community, rather than a purely geographic representation. *See* J.R. POLE, *supra* note 51, at 172-249. Indeed, as Pole notes, when geographic lines were first substituted for county representation in Massachusetts in the 19th century by Elbridge Gerry, voters were offended at the separation of representation from community and called his districting a "gerrymander." *Id.* at 247. This suggests that geography alone did not then correspond to any genuine sense of representation, nor, I would argue, does it today. That is, despite a widespread and strongly-felt adherence to a geographic system of allocating individual representation, I do not believe that voters form any identification with their voting district and do not think of themselves as being represented in their capacity as members of such district. Indeed, the ease with which individuals are moved from one district to another with a stroke of the pen further indicates that these geographic districts do not correspond to anything fundamental about the voter.

62. The individual approach is embodied in such cases as *Baker v. Carr, Reynolds v. Sims,* and *Whitcomb v. Chavis, see infra* notes 64-76, 100-08 and accompanying text, as well as in Justice Thomas's concurrence in *Holder.*

63. The communal approach is embodied in such cases as *Allen,* and *Gingles* and *De Grandy. See infra* notes 90-108, 133-35, 179-86 and accompanying text.

occurs at the group level, if a group is the unit of representation, then we *must* ask how much representation that group ought to have.

As we trace the Court's use of these different theories of representation, then, it is useful to remember that all these decisions represent reactions to the districting conundrum. Moreover, the Court's experience with individual representation demonstrates that we cannot ignore the districting conundrum, just as the Court's experience with group representation shows us that we cannot answer the districting conundrum.

B. The Individual as The Unit of Representation

Although the notion of the individual as the unit of representation has been around for quite some time,[64] its ascendancy as the primary or sole basis for representation was both recent and short-lived. Until the 1960s, notions of individually-based representation coexisted with older notions in such a way as to prevent the implementation of a truly individual representation. When individual representation was finally implemented, it was quickly seen to be inadequate and almost immediately supplemented with a communal vision of representation.

A fully individual notion of representation in a representative democracy depends on two corollary principles. The first principle is that every individual must have the opportunity to vote—that is, universal suffrage is a logical corollary to representation on an individual basis. The second proposition is that each person's vote is equal to every other person's—the principle of one person, one vote. This, too, is a logical corollary of the individual theory of representation.

(1) One Person, One Vote

The principle of "one person, one vote" follows directly from the notion that the individual—the "person" referred to in the slogan—is the unit of representation. Equality of representation, a basic principle of democracy, requires equality at the level of whatever the unit of representation. If the unit of representation, for example, is the town or the state, then equality of representation will require that each town or each state have the same number of representatives.[65] Taking

64. *See supra* note 51.

65. Using once again the analogy of the United Nations, no one has proposed—or at least, no one has seriously entertained—basing representation in the United Nations on the population of the constituent countries. The point is that we take for granted that the unit of representation in the United Nations is the nation-state, and we find no inequality in giving nations of vastly different populations the same representation.

into account the relative populations of the units will, on such a view, be seen as *unequal* representation.[66] "One town, one vote" is as persuasive a slogan as "one person, one vote," if you understand the town to be the basic unit of representation. Once you recognize the individual as the basic unit of representation however, fairness and equality will require that each individual be represented equally—that is, one person, one vote.

Prior to 1962, however, the Supreme Court had never required that representation be apportioned on an equal basis. Between 1962 and 1964, in the line of cases beginning with *Baker v. Carr*[67] and ending with *Reynolds v. Sims,*[68] the Court recognized that the right to vote can be denied by dilution of voting power as well as by an absolute prohibition on casting a ballot.[69] In *Reynolds,* the Court recognized that if one representative represents ten individuals and another represents twenty individuals, then the twenty constituents in the second group have half a vote compared to the ten in the first group; the Court found this to be a violation of equal protection.[70]

Prior to 1962, then, the individual was not fully recognized to be the basic unit of representation, because it was not considered necessary that each *individual* be equally represented. But even after the Court's recognition of the principle of "one person, one vote," the individual theory of representation was still not fully realized, because not all individuals were permitted to vote.

(2) Universal suffrage

When a class, an organization, or a town is being represented, universal individual suffrage is not logically necessary for democracy.

66. *See* POLE, *supra* note 51, at 203.

67. 369 U.S. 186 (1962). *Baker* recognized the justiciability of challenges to apportionment on the grounds of vote dilution.

68. 377 U.S. 533 (1964).

69. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds,* 377 U.S. at 555.

70. This principle seems so obvious that it often seems surprising that it took the Court nearly 100 years after the principle of equal protection was formally adopted to recognize it. The explanation for this lies, I think, in the remnants of corporate notions of representation. Towns and counties continued to remain the basic unit of representation in at least a part of state government long after the notion of the individual had emerged. By 1964, however, corporate bodies were no longer accepted as the basis of representation—indeed, they had ceased to be the unit of representation even in practice, and were replaced, for the most part, by the district. By 1964, it is likely that the Court, and most Americans, could conceive of no other basis for representation than the individual. At that point, "one person, one vote" became necessary and obvious.

Because the group is the entity that is represented, but individuals who vote, there is no one-to-one correspondence between voting and representation. One does not acquire representation by voting, but rather by being a member of a community that is represented. In this circumstance, it is not necessary that every individual have a voice in choosing the representatives for the community.[71] Some subset of the group may be perceived to be best situated to decide who will represent the group as a whole. The nonvoting individuals are no less represented than the voting ones, because in fact none of the individuals are represented. Only the community is actually represented. Thus, the division between voting—which is performed by individuals—and representation—which takes place at the group level—makes it possible to have universal representation without universal suffrage.

But once you conceive of the individual as the unit of representation, universal suffrage becomes inevitable in a democracy. For if it is the individual, and not some group of which the individual is a part, that is represented, then the only way to acquire representation is to vote. Representation means, in this context, that each *individual* is sending a deputy, a delegate to speak for *her.* Others like her may be represented, but without a mediating concept of a group that is being represented, there is simply no way to understand the representation of an individual separate and apart from that individual's participation in the process of selecting the representative.[72] An individual who is not permitted to vote is unrepresented in such a system, and in a true democracy, there can be no logical justification for such an omission.

Nonetheless, for most of the history of this country, African-Americans and women were denied the right to vote and thus were denied representation. It took two constitutional amendments to rectify that situation in theory, but even after the constitution was

71. We are not surprised when the President of the United States appoints a representative to the United Nations. The ambassador so appointed represents the United States as an entity—it seems unremarkable that the President, as the head of state, should choose its representative. Thus, we do not demand that our representative to the United Nations be elected by a popular vote.

72. I do not wish to suggest that it is never possible for someone to choose a representative for someone else. In this context, however, I believe that it is sufficient to say that no democratic principle could justify allowing some individuals to choose their own representatives, while denying others that privilege, while representation is understood to occur at the individual level. Of course, even individuals who have the right to vote often choose not to. I would argue that such individuals are not represented, and that actual participation in the process of choosing a representative is the only way to acquire representation if the unit of representation is the individual. But a system that offers representation to anyone who wants it would still seem to be a representative democracy, even if some individuals were unrepresented by choice.

amended to require that every individual be given the right to vote, African-Americans were routinely denied that right.[73] The Voting Rights Act of 1965 was designed to remedy that situation.

The Act was designed to make the promise of African-American suffrage real by removing the roadblocks that prevented black Americans from registering to vote and casting their ballots.[74] The Act in its original version represents the triumph of the individual notion of representation: its fundamental principle is that the unit of representation is the individual and therefore *every* individual must be given the opportunity to participate in the selection of representatives. Moreover, the Voting Rights Act was, by and large, successful in removing formal barriers to registration and voting.[75]

Prior to *Reynolds* and the enforcement of the Voting Rights Act, it was impossible to say how the individual theory of representation would work in practice, for in fact it had never been tried. It was only with the passage of the Act—*Reynolds* having been decided the year before—that the notion of the individual as the unit of representative democratic government could at last be tested. For the first time, every individual had the right to be represented and every individual was equally represented. Almost as soon as the individual theory of representation was fully realized, however, its limitations became apparent.[76]

73. The HOUSE JUDICIARY COMMITTEE REPORT ON THE VOTING RIGHTS ACT OF 1965, H.R. REP. NO. 439, 89th Cong., 1st Sess. 8 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-40, noted: "The history of the 15th amendment litigation in the Supreme Court reveals both the variety of means used to bar Negro voting and the durability of such discriminatory policies . . . through the 'grandfather clause' cases . . . and the 'white primary' cases . . . to racial gerrymandering . . . to improper challenges . . . and, finally, the discriminatory use of tests . . . ." The report further documented that "Progress [in eliminating discrimination] has been painfully slow, in part because of the intransigence of State and local officials," and that "Barring one contrivance too often has caused no change in result, only in methods." *Id.* at 9-10.

74. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (discussing history of discrimination and Congress' response).

75. *See* Guinier, *supra* note 13, at 1092-93.

76. As discussed *infra* in Part II.C.2, the limitations discussed here result from a larger incoherence in the individual theory of representation. Thus, although the argument here focused on the particular issues of racism that arose in the 1960's, I believe that the problems with individual representation are fundamental and would not be overcome even if racism could somehow be eliminated.

C. The Limitations of Individual Representation

(1) Individual Representation and Racism

The individual theory of representation reached its limits when it was confronted with racism, a problem it was singularly unable to address. Once whites were no longer able to prevent blacks from registering and casting their votes, they quickly figured out how to nullify the effect of African-American votes through a variety of other, more subtle techniques, such as "cracking,"[77] "stacking,"[78] and the use of at-large, winner-take-all districts.[79] These devices defied analysis under traditional notions of individual representation.

In the late 1960s, the Court confronted this problem. In 1966, Virginia and Mississippi made certain amendments to their voting laws. The amendments were, on their face, color-blind. Moreover, the amendments did not prevent anyone, black or white, from casting his or her vote. One of the amendments in Mississippi was to change the way county board of supervisors was elected. Prior to 1966, each county in Mississippi was divided into five districts; each district elected one member of the board.[80] In 1966, Mississippi law was amended to permit counties to elect the entire board of supervisors at large by all qualified electors of the county. After the amendment was passed, at least two Mississippi counties chose to switch to an at-large system of representation.[81]

Under a purely individual theory of representation, there could be no problem with such an amendment. Each voter in the county was permitted to vote; each person's vote carried exactly the same weight. Of course, the majority would prevail and the minority would lose, but that is, after all, the way voting works. Because a strictly individual theory of representation does not recognize group rights to representation, there could be no way to attack the change in Missis-

77. "Cracking" refers to the practice of dividing minority group members among multiple districts, in each of which they will be in the minority. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering,* 9 YALE L. & POL'Y REV. 301, 303-04.

78. "Stacking" refers to the practice of placing all the minority voters into one district in which minority group members are already a majority, and thus preventing these additional group members from influencing another election in which they are not already in the majority. *Id.* Thus, if African-Americans make up 55% in each of two districts, district lines would be redrawn so that African-Americans would constitute, say, 80% in one district, and 30% in the other, thus reducing the number of seats controlled by blacks from two to one.

79. *See, e.g.,* Allen v. Board of Supervisors, 393 U.S. 544 (1969).

80. *Id.* at 550.

81. *Id.*

sippi law; no *individual* was being denied to right to vote for the candidate of his or her choice, and under a strict individual theory of voting, there is no other unit of representation at which to look.

The problem was that, despite the inability of an individual theory of representation to recognize the defect, it was clear that the change in Mississippi law would prevent African-Americans, who might well have comprised a majority in one or more districts while remaining a minority in the county as a whole, from electing a member of the board of supervisors. For while the individual theory of representation presupposed a world where the individual was the unit of representation, the voters in Mississippi didn't think in terms of individuals. They thought in terms of groups—specifically, racial groups. Although the Constitution and the theory of individual representation were blind to divisions of race, American voters and American legislatures were not. The white voters in Mississippi were content to let African-Americans go to the polls and cast their votes, so long as the white voters could be sure that the African-Americans would always be in the minority and therefore unable to elect representatives. The individual theory of representation was simply unable to address the problems of voting in world where voters think in terms of groups. If the Mississippi amendment and other manipulations like it were to be struck down, a different theory of representation would have to used. The Court would have to recognize some kind of group right before it could find the flaw in the Mississippi statute. In 1969, in *Allen v. State Board of Elections,* the Court adopted a communal view of representation in order to strike down Mississippi's attempt to disenfranchise its black citizens in this way.

Before turning to *Allen* and the Court's adoption of a communal view of representation, however, it is worth noting that the flaw in individual representation that precipitated this shift was not a fluke, or a result of unusual circumstances, but rather a fundamental problem with the individual theory of representation.

(2) The Unrepresented Minority

The incoherence of individual representation arises from the paradox of having one representative represent many individuals. If representation is conceived to occur at the level of a group or other entity, this phenomenon presents no problem. But if we dispense with the mediating concept of a group, we run into difficulties with the problem of having one representative for many people.

Consider the situation where an entity, a town, for example, is represented. How is the representative chosen? Each member of the community may vote on who the representative should be. The majority will prevail in its choice; the minority will not have its choice of representative. But the representative chosen in this way represents the entity—the town—rather than the individuals who comprise it. Neither the winners nor the losers are personally represented—only the town has a representative. To the extent that any voter feels herself to be a part of the town, she is represented, but only in the sense that the town's representative speaks for her community. Thus, to the extent that a dissenting voter who did not vote for this representative is a member of the entity, she is represented nonetheless. So long as it is the entity and not the individual that is represented, and so long as the individual is a member of that entity, then she is represented, even by the candidate she did not choose. But it is important to note that this notion turns entirely on the idea that no individuals are actually understood to be represented. Because it is not the individual who is represented, there is no difference between an individual who cast her ballot one way, and one who cast hers the other. Both—and neither—are represented to the same extent, because their identity as a party who can be represented is totally subsumed within the town.

Even where the entity, or the group that has voted for a representative, does not constitute the legal unit of representation, it may still make sense to speak of each voter, majority or minority, as being represented by the victor so long as the voters in fact constitute a coherent group. That is, to the extent that the dissenting voter identifies with the group of voters and feels herself to be part of this group, as opposed to other, random groupings of voters, she may still feel herself to be represented by someone she personally opposes. This is because the representative speaks for her community and even if the representative does not speak for her personally, to the extent that she identifies herself as a part of the community, she is represented because the community is represented. But in this context, representation still occurs on a group basis. The individual is not actually the unit of representation—once again, it is the group of which the individual feels herself to be a part.

The concept of "virtual representation" is a variation on this approach. "Virtual representation" refers to the notion that even if one did not choose one's own representative, someone else, perhaps the representative of another district, provides "virtual representation,"

by advancing one's interests and points of view.[82] Thus, the theory goes, a minority voter, though outnumbered in her district, may be "virtually" represented by a member of her group elected from another district.

The problem with "virtual representation," however is that it creates two classes of voters—those who actually choose their representative and those who do not actually choose, but whose interests are deemed by someone else to be adequately accounted for. It is difficult to see how such a distinction can be justified. If it is important for some voters to choose their own representative, why is not important for all?

More important, the concept of "virtual representation" most often depends on an "essentialist" philosophy.[83] What allows us to decide that an African-American in District A is "virtually represented" by the representative of District B, who was chosen by a majority of African-American voters, is the intermediate notion that what is essential about the voter is her race, and that any group of African-Americans can substitute for *her* in choosing her representative, because they are essentially the same. Thus, once again, it is the mediating concept of a group, this time a racial group, that gives meaning to the notion of "virtual representation." The individual is represented only insofar as she is understood to be a part of the racial group, so that she can be virtually represented by the representatives of that group.

When one representative purports to represent multiple individuals who are in fact nothing more than a collection of individuals—that is, who are being represented solely in their individual capacity—a problem arises. In theory, there is no problem with more than one person being represented by a single representative; the difficulty comes in choosing that single representative. If 10,000 people agree on and choose a single individual as their representative, that is well and good. But what if they do not agree? In what sense can an individual be represented by someone she did not choose, indeed someone whom she actually opposes? A group can act through the will of

82. *See, e.g.*, LANI GUINIER, THE TYRANNY OF THE MAJORITY 36-37, 130-34 (1994).

83. "Essentialism" is the notion that a unitary, "essential" African-American (or white, or female, etc.) experience can be isolated and described. *See* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990); *see also* T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COL. L. REV. 1060, 1092 (1991) (defining essentialism as the claim that "something unites all members of each race and that races may be differentiated on the basis of these common elements of identity or culture").

the majority of the members of the group, but if there is no group, 9,999 votes for a particular representative does nothing to provide representation for the lone dissenter. An individual *qua* individual can never be represented by someone she opposes, if representation is to be something more than an elaborate fiction.[84] For true representative democracy on an *individual* basis, every individual would have to be represented by a representative of her choice, for only then could we say that that individual has been spoken for and has participated, vicariously, in the process of governing. Any other form of representation necessarily turns on some mediating concept of a group—some community in which the individual participates and through which she is represented, despite the fact that she herself did not have an opportunity to choose that representative. If we dispense with the concept of the group, there is simply no way for a representative to represent an individual against her will.

It follows, then, that if representation is truly on an individual basis, some people will not be represented. If you do not have one representative for each individual, then it is impossible to ensure that each individual has a representative of her own choosing. Moreover, the mechanics of choosing one representative for multiple individuals require that individuals be grouped in some way for purposes of collectively choosing a representative. If the representative is chosen in a majority-win format, it is the minority of each grouping that goes without representation. Thus, significantly, it is the grouping of the voters that determines which individuals will be represented and which will not.[85]

There are any number of ways that this grouping can be carried out. Because the voters are seen to act only in an individual capacity and not as members of a group—indeed, the "group" has no real existence—no voter has a right to be grouped with any other voter or voters. The electorate, for example, could be divided alphabetically. Suppose, for example, that in a state assembly, there was one repre-

84. *See, e.g.*, JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 102-03 (Liberal Arts Press 1958) (1861) (defining "false democracy" as "the government of the whole people by a mere majority of the people, exclusively represented .... to the complete disenfranchisement of minorities.").

85. T. Alexander Aleinikoff and Samuel Issacharoff refer to these unrepresented voters as "filler people" in *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 601 (1993). Although this colorful term does describe the status of the unrepresented, I believe that it unduly suggests that this problem of unrepresentation is uniquely a problem of "constructed" districts—that is, districts drawn to produce or avoid a particular outcome of the districting conundrum, when in fact the problem occurs whether or not the individuals have been chosen by anyone to be "filler."

sentative for every 2500 people. You could take a list of all registered voters in the state (or all eligible voters, for that matter), arrange it alphabetically, and assign the first 2500 names to seat A, the second 2500 names to seat B, and so on all the way down the list. You would then hold an election for each seat.

Traditionally, of course, the grouping has been done geographically. But unless the geographic districts correspond in some way to communities of which voters feel a part, there is little difference between an alphabetic list and a geographic one—each one is little more than a random grouping.[86]

The incoherence of these groupings is illustrated in an early voting rights case, *Fortson v. Dorsey*.[87] In *Fortson,* certain Georgia voters challenged the apportionment of the 54 seats in the Georgia Senate. Thirty-three of the senatorial districts in Georgia were single-member districts comprised of one or more entire counties. Representatives from each district were elected by the voters residing there. The remaining twenty-one districts were drawn among the seven remaining counties; each of these counties contained at least two such districts. Representatives from these remaining twenty-one districts were elected on a county-wide basis in the county in which the district was situated, and not by the voters in the district alone. Plaintiffs challenged this arrangement, arguing that it violated the Equal Protection Clause by creating one class of voters that directly elected its senator and another class of voters whose choice can be overruled by other county residents from outside the district.

In an opinion by Justice Brennan, the Court upheld the apportionment plan. Justice Brennan conceived of each of the seven counties at issue as a multimember district, where the representatives were all elected at large in the district. The smaller units which were denoted "districts" were treated by Brennan as mere residency allocations, as each senator was required to live in the district, and not merely the county, for which he was elected. Justice Brennan noted in passing that the combination of single- and multimember districts used in *Fortson* could, in theory, "operate to minimize or cancel out the voting strength of racial or political elements of the voting popula-

86. Indeed, it is been argued that there is really very little connection between the compactness of a district—that is, adherence to geographic principles—and the values to be achieved by districting. *See* Bernard Grofman, *Criteria for Districting: A Social Science Perspective,* 33 UCLA L. REV. 77 (1985).

87. 379 U.S. 433 (1965).

tion," but found no evidence of such in the case at bar, and thus explored the issue no further.

But what was the unit of representation in *Fortson*? Brennan conceptualized the case as representation by county; Justice Douglas, in dissent, focused on the actual district. When viewed from that perspective, it would indeed seem odd that voters from outside these districts had a say in choosing their representatives. Both Brennan and Douglas recognized that another kind of representation altogether—that of "racial or political elements of the voting population" might also be implicated.

The basic problem in *Fortson* is the incoherence of the individual approach to representation. What was really being represented in *Fortson* were individuals, not districts or counties. But these individuals had to be grouped in order to elect representatives. Some individuals were being grouped with a relatively small number of other voters while others were grouped together with a larger number of other voters. Neither the county nor the ostensible district had any real significance.[88] Thus, the Court's efforts to figure out if the "real" unit here was the district or the county were bound to lead to confusion.

However the grouping is done, the problem of individual representation still exists. Because the grouping determines which voters will be unrepresented, it can be manipulated to ensure that certain voters—or certain types of voters—are consistently chosen to go without representation. That is what happened with the counties in Mississippi at issue in *Allen*. They arranged the voting so that the individuals who would go unrepresented would be disproportionately African-Americans.

But it is important to note that even if the grouping were carried out in a way that was completely neutral and that could be freed from all manipulation, a portion of the electorate would *still* go unrepresented in a majority-win system. The unrepresented would be chosen under such a system, in effect, by lot (and indeed, it would probably not be possible to tell in advance of the election who the unrepresented would be).[89]

88. It seems likely that the apportionment scheme in *Fortson* derived from an earlier time when representation was understood to occur on a county-wide basis, as the integrity of the county as a unit of representation seems to underlie the combination of district- and county-wide voting.

89. Even so, this works no great injustice (and indeed may have certain advantages over other, more representative systems) so long as the burden of unrepresentation is rotated. Those who are represented today—that is, those who voted for the winning candi-

What *Allen* and the cases that followed it recognized was that any districting system inevitably disenfranchises some voters. In essence, what these cases determined was that those disenfranchised voters could not legally be disproportionately African-American. But in order to accomplish that, of course, it was necessary to look beyond an individual perspective and adopt a communal perspective. Put another way, the facts of *Allen* and the cases that immediately followed dramatically illustrated the danger of ignoring the districting conundrum, and caused the Court to take a different look at representation in order to address the conundrum.

III. Communal Representation and The Supreme Court

A. The Communal Approach to Representation

A communal theory of representation is one that views a racial or ethnic community as the fundamental unit of representation. Under a communal theory of representation, it is the group, and not merely the individuals within that group, that is entitled to representation. Without express acknowledgment, beginning with the *Allen* case in 1969, the Supreme Court has incorporated the communal approach to representation into its voting rights jurisprudence. Moreover, Congress adopted and enacted a communal approach to representation into the 1982 amendments to the Voting Rights Act.

In *Allen,* the Court struck down the Mississippi law changing the county board of supervisor elections from district-based to at-large voting. The Court's reasoning is brief and instructive: "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[90]

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date—may go unrepresented tomorrow, when their candidate loses. If the grouping principle is truly neutral, then no individual should find herself permanently among the unrepresented. Moreover, even where the grouping principle is not neutral, and the system is manipulated, the privilege of being represented may continue to shift and rotate, if the system is manipulated along lines that themselves change. For example, electoral lines may be drawn to favor Democratic candidates over Republicans. An individual may vote Republican at one time, and Democratic another. Such a voter is not permanently unrepresented. In these cases, individual representation in majority-win districts may be incoherent and flawed, in that it does not provide representation for everyone, but the flaw does not so fundamentally undermine the system as to make it undemocratic. Where, however, particular groups in society are made permanent minorities, forever designated to go without representation, individual representation in this form ceases to be a kind of democracy, and becomes instead a tyranny by the majority over the minority. *See* Guinier, *supra* note 13 at 1080.

90. Allen v. Board of Supervisors, 393 U.S. 544, 569 (1969).

With this statement, the Court took a remarkable leap from one conception of representation to another. The Court in *Allen* cited *Reynolds v. Sims* in support of its claim about vote dilution, and *Reynolds* does hold that the right to vote can be affected by vote dilution.[91] But *Reynolds* addressed the dilution of an *individual* elector's vote, the situation where one person's vote carries more weight than another's. That was not the case in Mississippi under the law challenged in *Allen.* In the at-large voting scheme at issue, every vote was equal to every other vote, individually. So whose right to vote was being diluted in *Allen*? Clearly, the rights of African-Americans *as a group.* But that implies that African-Americans have an interest in voting *as a group,* separate and apart from the interest of each African-American individual. Thus, recognition that representation ought to take place on a group, rather than merely an individual basis, is fundamental to the *Allen* case.[92]

The only other explanation for the *Allen* decision would be that the Court was concerned that specific individual African-Americans had been denied representation. The problem with this explanation is that in a system of individual representation, some individuals are always denied representation. The Court has never found this to be objectionable and indeed has specifically held that it is *not* actionable.[93]

91. Reynolds v. Sims, 377 U.S. 533, 556 (1964).

92. These differing uses of term dilution correspond to the distinction that Professor Karlan has made between "quantitative dilution" and "qualitative dilution." *See* Karlan, *supra* note 13, at 173. Professor Karlan uses the term "quantitative dilution" to refer to the kind of vote dilution at issue in *Reynolds,* when a "mathematical analysis . . . shows that votes of persons in one district are devalued relative to the votes of persons" in another district, and "qualitative dilution" to refer to the kind of dilution at issue in *Allen,* where the electoral method "impairs the political effectiveness of an identifiable subgroup of the electorate." In this latter situation, Professor Karlan argues, it is the "quality" of representation that has been impaired, rather than the "quantity." *Id.* at 176. It should be clear, however, that Professor Karlan's distinction also turns on a change of focus from the individual to the group: in her definition of "quantitative dilution," it is "persons" whose vote is diluted, while her definition of "qualitative dilution" makes clear that it is "an identifiable subgroup" whose rights have been impaired.

93. The Court observed:

> Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the law since they have no legislative voice of their own. This is true of both single-member and multi-member districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates . . . .

Whitcomb v. Chavis, 403 U.S. 124, 153 (1971). It should be emphasized that plaintiffs in *Whitcomb* were alleging precisely that they were being denied representation because they were African-American. But the Court found that the absence of ghetto representation resulted not from bias, but rather from losing elections! 403 U.S. at 153.

One could attempt to explain *Allen* by arguing that even though *some* individuals must go unrepresented, a discrete and insular minority, such as African-Americans, should not be singled out to be the unrepresented, but this does not lead to the remedies prescribed by the Voting Rights Act and the Court in the post-*Allen* cases. The appropriate remedy in such a case would be a truly neutral system of districting, that would ensure that African-Americans were not singled out, on the basis of race, to be *disproportionately* among the unrepresented. But a remedy that goes beyond this and requires actual representation of the African-American community cannot be understood in terms of the individual theory of representation, because such a remedy would actually prescribe that African-Americans alone could not be among the unrepresented. Moreover, the Court itself described the infirmity in *Allen* as a problem of vote dilution, and not as one of lack of representation and there is no reason not to take the Court at its word here.

Indeed, wherever the Court speaks of the dilution of the voting strength of a particular segment of the population, it is employing the communal conception of representation. This concept simply doesn't exist if we look at voting and representation purely at the individual level.[94] Moreover, although it has stopped short of expressly acknowledging or endorsing a communal approach to representation, the Court itself has recognized that only such a conception can explain dilution cases like *Allen.*[95]

To the extent that *Allen* can be explained only with reference to communal concepts of representation, the case represents a turning point in the Supreme Court's voting rights jurisprudence. It is true that prior to *Allen,* the Court had suggested at least twice that vote dilution on a group basis might be an issue, but in neither instance did the Court actually employ such an analysis to decide the case.[96] And although *Gomillion v. Lightfoot*[97] is often cited as an early case of racial gerrymandering (and thus might be seen by some as an instance

94. *See* Holder v. Hall, 114 S. Ct. 2581, 2594 (Thomas, J., concurring).

95. Mobile v. Bolden, 446 U.S. 55, 78-79 (1980); *see also Holder,* 114 S. Ct. at 2594 (Thomas, J., concurring).

96. Burns v. Richardson, 384 U.S. 73 (1966) and Fortson v. Dorsey, 379 U.S. 433 (1965) both acknowledge the possibility that a particular voting scheme might "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns,* 384 U.S. at 88; *Fortson,* 379 U.S. at 438. In neither of these cases, however, was the scheme at issue alleged to do this, so the Court had no cause to consider further the implications of this notion.

97. 364 U.S. 339, 347 (1960).

when the Court turned to a communal view of representation to counteract racist manipulation of individual representation), I do not believe that *Gomillion* is properly viewed in that light. In *Gomillion,* the borders of Tuskegee, Alabama, were redrawn into an "uncouth" twenty-eight-sided-figure, the effect of which was to exclude African-Americans from the municipal electorate. Because *Gomillion* involved oddly shaped, gerrymandered borders, it is easy to think of the case as similar to other cases that involve manipulation of electoral districting. But *Gomillion* did not involve manipulation of the grouping of the electorate so as to ensure that African-Americans would be disproportionately in the minority. Rather, *Gomillion* is an *individual* voting rights case. The problem in *Gomillion* isn't with the way black voters are grouped—it is that blacks were excluded from voting *altogether. Gomillion* is thus an old-style vote-deprivation case. Indeed, the Court made that clear in holding that the legislature in *Gomillion* was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town *so as to deprive them of their pre-existing municipal vote.*"[98] The *Gomillion* Court was concerned with the deprivation of the right to vote; it simply did not address the issue from the perspective of the "dilution" of "minority voting strength."[99]

In *Allen,* however, there was no other approach that would lead to the result in that case, for unlike *Gomillion,* no one would be excluded from the polls under the Mississippi scheme at issue. Thus *Allen* represents a true shift in perspective from an individual- to a group-centered conception of voting rights.

To see how sharp a departure *Allen* was from the individual approach to voting, it is instructive to contrast the *Allen* decision with the Court's opinion in *Whitcomb v. Chavis*[100] two years later. In *Whitcomb,* plaintiffs alleged both that their individual votes were diluted

98. *Id.* at 341 (emphasis added).

99. The Court itself confirmed this interpretation in *Reynolds v. Sims* when it described *Gomillion* as involving "gerrymandering . . . which result[s] in denying some citizens their right to vote." 377 U.S. 533, 555 (1904) (citations omitted). Because *Reynolds* is itself a vote *dilution* case, if the Court had viewed *Gomillion* as involving vote dilution, it would have been natural for the Court to describe it that way.

This is not to say that the issue in *Gomillion* cannot be viewed as a case about dilution of voting strength. Indeed, the case may be simpler and clearer when so understood. Nonetheless, there is nothing in *Gomillion* to indicate that at the time the case was decided, the Supreme Court was thinking of the group rights of African-Americans, rather than the individual right of each African-American (former) resident of Tuskegee to cast a vote. More importantly, the Court did not need a group model of voting to find the defect in the scheme in *Gomillion*; the same cannot be said of the scheme in *Allen.*

100. 403 U.S. 124 (1971).

by an Indiana electoral system that mixed single-member district and multimember districts,[101] and also that the voting strength of blacks as a group had been minimized.

The district court accepted the group theory of representation in its entirety. In finding for the plaintiffs on their claim that their voting power as a group had been minimized, the district court sought to protect "'the legally cognizable racial minority group against dilution of its voting strength.'"[102] As a remedy, the lower court came up with its own districting plan that, as described by the Supreme Court, was "expressly aimed at giving 'recognition to the cognizable racial minority group whose grievance lead [sic] to this litigation.'"[103]

In reversing the district court, however, the Supreme Court held that, despite its decision in *Allen,* it was not prepared to recognize the right to group representation. The Court found nothing to suggest that ghetto residents had "less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice."[104] Moreover, the Court made clear what it believed this opportunity to mean:

> We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.[105]

Thus, the court relied on purely individual indicia of voting rights and participation to uphold the Indiana scheme. Indeed, the Court noted that the voting power of ghetto residents "may have been 'cancelled out,' as the district court held, but this seems a mere euphemism for political defeat at the polls."[106] *Whitcomb* thus turns a blind eye to precisely the problem recognized in *Allen*: that the votes of any group can be nullified if the electoral system is rigged to ensure that the group will always be a minority in the relevant grouping for repre-

101. Plaintiffs offered a mathematical model of voting strength designed to show that a multimember district with three times the population of a single-member district was in fact greatly overrepresented if it had three members to the single-member district's one. The Court rejected this model as entirely theoretical. *Id.* at 145-46 nn.23-24.

102. *Id.* at 139 (quoting Chavis v. Whitcomb, 307 F. Supp. 1362, 1365 (S.D. Ind. 1969)).

103. *Id.* at 139 (quoting *Chavis,* 307 F. Supp. at 1366) (correction in original).

104. *Id.* at 149.

105. *Id.* at 149.

106. *Id.* at 153.

sentation.[107] Indeed, the wrongs alleged in *Allen* seem to be the same wrongs as were alleged in *Whitcomb*—at-large voting used to dilute minority voting power—with the Court reaching very different results through application of very different conceptions of what was at stake.

Whitcomb, however, is an anomaly. The cases that followed *Allen* for the most part adopt the communal views of representation reflected in *Allen.* In *Perkins v. Matthews,*[108] for example, the Court held that a municipal annexation that decreased the percentage of black citizens within the city limits was subject to challenge under section 5 on the ground that it decreased minority voting strength. Although the Court did not discuss what it meant by "dilution" in this context, once again only a communal theory of representation could support the Court's conclusion. In one sense, of course, any increase in the population of a municipality results in vote dilution. If prior to the increase, there was one representative for every 5,000 persons, and if after the increase there is now one representative for every 5,100 persons, then the vote of every individual has been diluted from =1/5,000 to =1/5,100, regardless of how the increase in population occurred. Clearly, this is not the kind of vote dilution addressed in *Reynolds,* cited by the Court as the source of its "dilution" analysis. For although the vote of every individual has been *absolutely* diluted in this scenario, there has been no *relative* dilution. Because *everyone's* vote has been diluted, each person's vote is equal to that of everyone else. *Reynolds* was concerned with relative dilution—when some people's votes counted more than others—not absolute dilution that occurs whenever the population of a political unit grows.

The annexation in *Perkins* must have caused some absolute vote dilution. But this can hardly be what subjected it to the coverage of the Voting Rights Act. Moreover, viewed from an individual perspective, there was no relative vote dilution in *Perkins*: following the annexation every citizen's vote still had equal weight. It is only when we consider the voting strength of African-Americans as a group that the concept of relative vote dilution makes sense in this context. Commu-

107. In fact, the Court in *Whitcomb* recognized that in a winner-take-all style of election, "Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own." 403 U.S. at 153. But the Court still viewed this as a problem of unrepresented *individuals,* not of an unrepresented group. Indeed, the Court expressly rejected the group notion of representation in *Whitcomb,* in part because of the difficulty of determining which groups are entitled to be recognized.

108. 400 U.S. 379 (1971).

nal representation, then, provides the theoretical basis for the *Perkins* case just as it did for *Allen.*[109]

Similarly, in *Gaffney v. Cummings*[110] and *White v. Regester,*[111] the Court relied on a communal approach to representation in its analysis of multimember districts. In *Gaffney,* Connecticut's legislative districting plan was challenged because it attempted to create Republican and Democratic districts in proportion to Republican and Democratic voters in the state. The Court upheld the plan as valid, stating that only if racial or political groups were "fenced out of the political process and their voting strength invidiously minimized" would the plan be struck.[112]

In *White,* the companion case to *Gaffney,* the Court invalidated certain multimember districts upon showing that they diluted minority voting strength. The Supreme Court in *White* takes the individualistic notions in *Whitcomb v. Chavis* and turns them on their head. In *Whitcomb,* the Court had refused to strike down multimember districts because there was no showing that individual African-Americans were denied the right to register or vote, that is that individual African-Americans had "less opportunity" than other residents "to participate in the political processes and to elect legislators of their choice."[113] In *White,* the Court used this language to strike down multimember districts in Texas, but with a critical change. No longer was it "ghetto residents" who had to have been denied equal participation in the political processes; rather the Court in *White* held that the touchstone for challenging multi-member districts was evidence that "the political processes leading to nomination and election were not equally open to participation by the *group* in question."[114]

This was not simply a careless change in language, for the Court's application of this standard in *White* showed a greater focus on the group than had its application of the similar standard in *Whitcomb.* The Court in *Whitcomb* focused its analysis on registration, voting,

109. Similarly, in City of Port Arthur v. United States, 459 U.S. 159 (1982), the Court evaluated two consolidations and an annexation, along with accompanying changes in the structure of the city council, in accordance with the effect such changes would have on the voting strength of the black community.

110. 412 U.S. 735 (1973).

111. 412 U.S. 755 (1973).

112. Indeed, the Court held there was no basis to invalidate a plan that "undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S. at 754.

113. *Whitcomb,* 403 U.S. at 149.

114. *White,* 412 U.S. at 766 (emphasis added).

and participation in party affairs, all ways that individuals can participate in the political process. The Court in *White* looked at these factors, too. But the Court in *White* broadened its analysis, looking at structural aspects of slating and primaries that, while not in themselves improper or invidious, nonetheless enhanced opportunities for discrimination.[115] The Court also examined the effects of these structures as well as the racial campaign tactics prevalent in the counties in question to reach its conclusion that "the black community has been effectively excluded from participation" in the political process.[116] The Court's language in *White* as well as its shift to a group notion of voting rights is critical because in 1982, in amending the Voting Rights Act, Congress looked to the *White* case to provide the standards for the vote-dilution analysis, incorporating directly into the statute the Court's language.

In *City of Rome v. United States,*[117] Rome, Georgia, changed its City Commission and Board of Education from plurality-win elections for all seats to majority-win elections for numbered seats, with run-off elections whenever there was no majority winner. The Court held that these changes had the effect of diluting black voting power and struck them down. A similar scheme was also invalidated in *Rogers v. Lodge*[118] where the Court found that it had been maintained for the purpose of diluting the voting strength of African-Americans.

In all of these cases, the Court looked to the voting strength of minority groups, rather than to the voting power of the individual. In doing so, the Court implicitly adopted the notion that it is the group, rather than the individual, that is entitled to representation.

In 1982, Congress incorporated this concept of representation into the Voting Rights Act itself. The 1982 amendments to the Act were a response to the Supreme Court's 1980 decision in *Mobile v. Bolden,*[119] the companion case to *Rome v. United States. Mobile v. Bolden* involved an electoral scheme nearly identical to the one struck down in *Rome* and also in *Rogers.* The difference between *Mobile* and *Rome* was that in *Rome,* the majority-win system was put into place in 1966, whereas the Mobile system had been in effect since 1911. That meant that *Rome,* but not *Mobile,* was covered by section 5, which applies to changes in voting procedures. Because the major-

115. *Id.* at 766-67.
116. *Id.* at 767 (quoting Graves v. Barnes, 343 F. Supp. 704, 726 (W.D. Tex. 1972)).
117. 446 U.S. 156 (1980).
118. 458 U.S. 613 (1982).
119. 446 U.S. 55 (1980).

ity-win scheme in Mobile was not a change in voting procedures, it could be challenged only under section 2 of the Act. In *Mobile v. Bolden,* however, the Court held that a section 2 violation required proof of discriminatory intent, although a showing of discriminatory effect was sufficient under section 5.

Even though *Mobile v. Bolden* seriously limited the scope of section 2, it nonetheless incorporated the communal notion of representation to the extent that it recognized that the voting strength of a group could indeed be diluted.[120] In 1982, Congress legislatively overruled *Mobile* by amending the Voting Rights Act to make it clear that proof of discriminatory effect was sufficient to make out a violation of section 2. In doing so, however, Congress incorporated into the Voting Rights Act the communal theory of representation inherent in the notion of minority voting strength.

Congress need not have incorporated this view, if all it wanted to accomplish was to overrule *Mobile.* At the time the *Mobile* case was

120. Indeed, this is clear from the *Rogers* case, decided two years later. *Rogers* involved a majority-win scheme similar to that challenged in both *Rome* and *Mobile.* As in *Mobile,* and unlike *Rome, Rogers* was a § 2 case, because the electoral system had been in place prior to the enactment of the Voting Rights Act. The plaintiffs in *Rogers* prevailed because they were able to demonstrate that the system was being maintained in order to dilute African-American voting strength. Thus, *Rogers* further makes clear that the *only* reason the Mobile voting system was not invalidated was because the Court believed it was necessary to show discriminatory intent.

One sentence in the Court's decision in *Mobile v. Bolden* seems to evoke the individual view of representation, but overall *Mobile,* as noted above, is based on a communal approach. The basic holding of the case was that § 2 of the Voting Rights Act, the Fifteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment all required a showing of purposeful discrimination. In its discussion of the Fourteenth amendment, the Court assumed that the issue was "the lack of representation multimember districts afford various elements of the voting population." 446 U.S. at 65. The Court had no trouble with this concept of vote dilution; the problem in *Mobile* is the Court's insistence on a showing of intent. Because the at-large system had been established in Mobile in 1911, at a time when African-Americans were effectively prevented from voting, the Court could not say that the system was designed in order to dilute their (nonexistent) vote.

This analysis makes all the more curious Justice Stevens's passing note that because African-Americans "register and vote without hindrance" in Mobile, there was no purposeful discrimination. Such a comment completely ignores issues of vote-dilution, and focuses instead only the individual's right to cast a vote. Despite this remark, however, *Mobile* should not be seen as a return to an individual notion of representation. The thrust of the opinion is so clearly on the issue of intent, and the Fourteenth Amendment analysis so explicitly employs a communal notion of vote-dilution, that it seems unlikely that Stevens really meant that the issue of intent was resolved solely by the question of registration and actual voting. Indeed, there is no serious question in the opinion that plaintiffs had not proven intent, and Stevens was not attempting to resolve this point when he made his remark.

decided, section 2 provided: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied . . . *to deny or abridge* the right of any citizen to vote on account of race or color . . . ."[121] The 1982 amendment altered this provision to read: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . *in a manner which results in a denial or abridgement* of the right of any citizen of the United States to vote on account of race or color . . . ."[122]

This change was by itself sufficient to overrule the holding in *Mobile* by making it clear that it was the discriminatory result, not the intent, that was prohibited. But Congress did not stop there. In addition to this change, Congress added subsection (b), providing that "[a] violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and *to elect representatives of their choice.*"[123]

This language is significant, because it can mean only that Congress based the 1982 amendments on the group theory of representation.[124] If Congress had meant the statute to apply only to individuals, it would have said "to *vote* for a representative of their choice," for individuals have no right to *elect* anybody. Only a group can actually elect representatives. Moreover, the language of section 2(b) is drawn directly from *White v. Regester,* where it clearly refers to a group theory of representation.

That the 1982 amendments codified a group theory of representation is also clear from the legislative history of the amendments. The

121. 42 U.S.C. § 1973(a) (emphasis added) (repealed 1982).

122. 42 U.S.C. § 1973(a) (1988) (emphasis added).

123. 42 U.S.C. § 1973(b) (1988) (emphasis added).

124. Congress took this language from the opinion in White v. Regester, 412 U.S. 755, 766 (1972), where it is clear that the Court was looking at vote-dilution from the perspective of group rights. *See supra* text accompanying notes 111-16. Interestingly enough, however, the *White* decision is not the original source of this phrase. Rather the phrase "less opportunity . . . to participate in the political processes and to elect legislators of their choice" appears originally in *Whitcomb v. Chavis,* where it clearly refers to the rights of individuals, not groups. *Whitcomb,* 403 U.S. at 149. In incorporating this language into the Act in 1982, however, Congress explicitly stated that it was looking to the *White* case, and thus the group-rights focus of *White,* rather than the individual-rights focus of *Whitcomb* would seem clearly to have intended. Moreover, I would still argue that the language by its very terms incorporates a group approach to voting rights and that its appearance in *Whitcomb* is incoherent.

Senate Report, setting out the history and purpose of the amendments, focuses on the need to preserve the viability of (*Allen*-type) vote dilution cases.[125] The Report notes that "*Reynolds* involved dilution of votes as a result of population disparities among legislative districts, but six months later the Supreme Court recognized that population differences were not the only way in which a facially neutral districting plan might unconstitutionally undervalue the votes of some and overvalue the votes of others."[126] The Report goes on to express concern about the impact of *Bolden* specifically on vote dilution cases,[127] and then to note that the amendment is "meant to restore the pre-*Mobile* legal standard which governed cases challenging elections systems or practices *as an illegal dilution of the minority vote.*"[128] The Report specifically cites *Perkins v. Matthews,* a case employing a group conception of voting rights as "consistent with Congressional intent."[129] Moreover, it is clear that the codification of the language of *White v. Regester* was no accident: the Report is explicit that the amendments were intended to codify the *White* case.[130] Moreover, some of those who opposed the 1982 amendments did so precisely because they understood the legislation to enact a group theory of representation. Thus Senator Hatch wrote, "Instead of directing its protections toward the individual citizen as did the original Act . . . the amendments would make racial and ethnic *groups* the basic unit of protection."[131]

The 1982 amendments highlight an interesting ambiguity in the term "results." It is commonly understood that the 1982 amendments changed section 2 from an intent-oriented provision to a result-oriented provision. But "results" has two different meanings here. The basic meaning, as used by the Court in *Mobile v. Bolden,* is simply that actual intent to discriminate is not required. Thus, if the location of polling places, for example, had the effect of making it difficult for

125. S. REP. NO. 417, 97th Cong., 2d Sess. 20-27 (1982) [hereinafter SENATE REPORT], *reprinted in* 1982 U.S.C.C.A.N. 177, 197-204.

126. *Id.* at 20, 1982 U.S.C.C.A.N. at 197.

127. *Id.* at 26, 1982 U.S.C.C.A.N. at 203.

128. *Id.* at 27, 1982 U.S.C.C.A.N. at 205 (emphasis added).

129. *Id.* at 8, 1982 U.S.C.C.A.N. at 185 (citing Perkins v. Matthews, 400 U.S. 379 (1971)).

130. The Senate Report clearly states that "[t]he amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester.*" *Id.* at 94, 1982 U.S.C.C.A.N. at 179. Throughout the Report, *White v. Regester* is cited as the touchstone for what Congress intends its amendments to do.

131. *Id.* at 193, 1982 U.S.C.C.A.N. at 267 (emphasis in original).

African-Americans to cast their votes, then such locations could be found to violate section 2 even in the absence of evidence that the locations had been chosen for that reason. In this sense, a "results" test has nothing to do with the results of elections, but rather with the actual effect a "standard, practice, or procedure" has on the ability of members of a minority group to cast their votes.

The other meaning of "results" is quite different. In its broader sense, a "results test" refers to the effect of a practice on a group's ability to affect the outcome of elections. In this sense, it means that it is not enough for members of a minority group to cast their ballots, but that they must have an actual ability to elect candidates of their choice, or to affect the result of the election. In this sense, a "results" test means taking up the challenge of the districting conundrum, and ensuring that members of a minority group actually have the opportunity to have a say in the outcome of an election.

This second meaning of results test must be distinguished, however, from a true *outcomes* test, which Congress explicitly rejected. The group-oriented results test that I have described looks at whether a group has the ability to affect the outcome of elections. It does not look at the *actual* outcomes of elections. Thus, this kind of "results test" does not look at who was actually elected, but only at whether minority groups had an opportunity to affect the outcome.[132]

Following the 1982 amendments to the Voting Rights Act, the Court continued to apply the communal approach to representation in analyzing challenges under the Voting Rights Act, and indeed further fleshed out the meaning of that approach. In *Thornburg v. Gingles,*[133] the Court attempted to define what constitutes a community or group entitled to communal voting rights. The Court announced three criteria that must be satisfied before a group can bring a claim of vote

132. In his remarks on the 192 amendments in the Senate Report, Senator Dole noted that "Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity and lose, the law should offer no redress." *Id.* at 193, 1982 U.S.C.C.A.N. at 364. That Senator Dole's remark was offered in support of a "results" test only highlights the ambiguity of his remark. Certainly, his emphasis on the lack of redress when minority candidates lose is a rejection of an outcomes test. It is less clear what kind of results test Dole is endorsing. That depends entirely on what we understand "an equal chance of electing candidates of their choice" to mean. A districting scheme that aggregates certain voters in a way that renders their votes irrelevant might well be understood to deprive those voters of "an equal chance of electing candidates of their choice"; such a construction would adopt the broader, group-based meaning of a "result" test, rather than the narrower test that would look only at the effect on individuals.

133. 478 U.S. 30 (1986).

dilution: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority must demonstrate that it is politically cohesive; and (3) the minority must show that there is majority bloc voting—that is, that majority voters do not vote for minority candidates.[134] A minority group that meets these criteria is entitled to an electoral structure that will allow it to elect representatives in proportion to its numbers; a minority group that does not meet these criteria has, under *Gingles,* no such right.[135] Obviously, there is no need to define which groups are entitled to representation unless a communal concept of representation is assumed.

The communal theory of representation has not, however, proved to be a panacea for the ills identified in *Allen.* For with the communal theory of representation comes the districting conundrum: if communities are the unit of representation, how much representation should each community get? In addition, as demonstrated in *Gingles,* the communal theory of representation may require that we define which communities are entitled to representation. Finally, the very notion of communal representation is based on an essentialist philosophy that may result in large numbers of individuals being excluded from the democratic process.

Although these problems are inherent in the use of communal representation, they may not have been immediately obvious in part because of the way in which geographic districting has been used to conceal the adoption of a communal approach to representation.

134. *Id.* at 50-51.

135. *Gingles* is based on a peculiar hybrid of the communal theory of representation with a purely geographical approach. Under *Gingles,* minority voting rights depend on racially-segregated housing patterns—if minority group members live close to one another, they may be geographically compact enough to meet the first criterion; if they are dispersed throughout the white community—even if in smaller, segregated enclaves—they will not. It is difficult to understand why this should be so.

One possible answer is that minority groups in compact communities do not have greater rights than minority groups that are dispersed—it is simply easier to recognize racially-motivated districting when the *Gingles* criteria are met. This would make *Gingles* purely a case about proof.

The problem with this approach is that it leaves the Court without a theory of how plaintiffs who meet the *Gingles* criteria have been harmed. It is true that, having met the criteria, plaintiffs can show that at-large voting has been chosen for racially-motivated reasons. But the majority has a right to choose at-large voting, thereby depriving minority group members of an effective electoral voice, so long as they do not do so for the wrong reasons—for reasons of racial bias. Put another way, the majority has not abridged any voting rights that the minority actually had—it has simply acted with an intent to do so.

B. Communal Representation and Geography

Despite its widespread adoption in case law and statute, communal representation has never been used as the exclusive approach to representation. Rather the Court, as *Gingles* (and other cases) demonstrates, has combined communal representation with a geographic approach to districting.

In *Gingles,* the Court grafted a requirement of geographical compactness onto the theory of group representation, in effect affording voting rights protection only to those minority groups that were also geographically compact. *Gingles* thus suggested that one characteristic of a group that is entitled to recognition is geographic compactness. It is difficult to see why this should be so. Our sense that African-Americans make up a distinct racial community—and that they are so viewed by their white neighbors—does not really turn on the degree to which housing remains racially segregated. Paradoxically, communal representation is more necessary, not less, where residential segregation is incomplete. Where you have true segregation, geographic representation by itself, without appeal to the concept of group voting strength, provides minority representation. Partial integration threatens to dilute this voting strength without decreasing the significance of racial categories in the minds of American voters.

The problem is that the two approaches—communal representation and geographic districting—are conceptually incompatible. Geographic districting is essentially a method for dividing up individual voters. It is true that, at least theoretically, geography could also provide the basis for an alternative conception of communal representation, where the communities to be represented are defined geographically, rather than ethnically. However, the current mobility of American society, combined with the indistinctness of geography in a country of sprawling development, makes such a conception unrealistic as well as unworkable. Although individuals may derive some sense of identity from geography largely defined at the local level at which districting takes place, the distinctions that must be made simply do not appear to correspond to meaningful distinctions in the groups with which voters identify. That is to say, voters may identify in some meaningful way with the town in which they live, but they do not identify with one particular combination of their town with other neighboring towns, as opposed to other possible combinations. Thus, it makes sense to treat the current use of geography in districting as providing administrative divisions among individual voters, rather

than as representing true communities that are being represented in themselves.

This combination of individual representation, geographically defined, with communal representation is, however, incoherent. If voters are treated as individuals, to be divided up administratively, then the communities to which they belong have no group rights to representation. On the other hand, if the community is the true source of representation, then the geographic dispersion of the individual members of the group ought to be irrelevant. The problem with combining these two theories is that the combination, which says that minority groups are entitled to communal representation that cannot be unfairly diluted if and only if the group is residentially segregated, is not a principle that one would wish to uphold. It adds a roadblock to representation by requiring minority groups to meet an extra condition before qualifying. Moreover, by enshrining residential segregation as the bedrock of political power, it discourages more integrated housing patterns.

Although individual, geographically based representation and communally based representation are conceptually two different things that cannot be coherently combined, the Court's blurring of these theories is understandable, because they have often coincided.[136]

In any event, the uncoupling of communal representation from geography does make the uses and implications of communal representation clearer and provides an opportunity to identify the limitations and weaknesses in that approach. These problems have inhered in communal representation from the beginning, but were by and large ignored. Now that it is no longer possible to ignore them, we can see that they have always been there.

136. The temptation to combine these two theories, and the difficulty of doing so, is illustrated in Justice Ginsburg's moving dissent in this Term's latest voting rights case, Miller v. Johnson, 115 S. Ct. 2475 (1995). Arguing that ethnicity is a valid basis for representation—that is, arguing for a communal approach to representation—Ginsburg notes that "legislators classify voters in groups—by economic, geographical, political or social characteristics .... That ethnicity defines some of these groups is a political reality.... If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated." *Id.* at 2506 (Ginsburg, J., dissenting). But Ginsburg herself recognizes that the ethnic districts to which she refers are in cities with ethnic neighborhoods so that geography and ethnicity combine. *Id.* at 2505. Thus, the districts that Justice Ginsburg uses to illustrate her argument in favor of communal representation could be nothing more than geographic districts of individuals.

C. The Limitations of Communal Representation

The difficulty with the communal approach to representation is that it eventually forces us to confront the districting conundrum. And when we do confront this central question—how much representation each group should get—we inevitably discover that the question is unanswerable. If the purpose of recognizing group or communal representation has been primarily to identify when a particular group is getting less than its fair share of representation—when its votes, taken together, have been diluted—we need to know what that fair share "should" be.

There are really two different concepts of dilution involved here, only one of which raises the difficult question. First, we might say that the voting strength of a group has been diluted when the voting strength is changed in such a way that the group now has less voting strength than it did before, a kind of "temporal vote dilution." This concept is adequate if all we care about is ensuring that a group does not become worse off than it was before. Section 5 of the Voting Rights Act is aimed at preventing temporal vote dilution. But the concept of temporal vote dilution is of limited use. Although it protects groups from an erosion of representation, it does nothing actually to improve their situation. It grandfathers in a baseline that may or may not have been fair in the first place. We should not be surprised when a historically disadvantaged group demands that we do better than simply not make it worse off, nor are we entitled to believe that we have rectified past injustices merely by freezing an unjust status quo.

If we wish to do more, we need a different concept of vote dilution. Thus, we might say that the voting strength of a group has been diluted if the group has less voting strength than it should have, or than other groups have. It is in order to address this kind of vote dilution—what I call "comparative vote dilution"— that we need some notion of what the voting strength of the group "should be." The districting conundrum is about comparative vote dilution—it asks us to identify when a group has been allotted fewer seats than it "ought" to have.

Within a few years of the *Allen* decision, the Court was confronted with cases presenting the districting conundrum in this form. Until recently, however, the Court was, for the most part, able to avoid actually determining the answer to the question of how much representation is the "right" amount.

In *White v. Regester*,[137] for example, African- and Mexican-Americans challenged a multimember districting scheme in Texas which, they alleged, unfairly diluted their voting strength. Finding that, on the facts before it, African- and Mexican-Americans were unfairly excluded from the political process, the Court held that the multimember scheme unconstitutionally diluted the voting strength of these groups, and struck it down. The scheme in *White* was challenged under the Fifteenth Amendment, not under section 5. Thus, temporal vote dilution was not at issue; and the only kind of vote dilution that the Court could have been talking about was comparative vote dilution.

But compared to *what*? The Court didn't say. It found the multimember voting system dilutive by looking at the overall circumstances in Dallas and Bexar Counties. Finding that African-Americans (in Dallas County) and Mexican-Americans (in Bexar County) were not able to participate equally in the political and electoral processes, the Court determined that the system was dilutive of minority voting strength, apparently reasoning that if it were not dilutive then African- and Mexican-Americans would have had equal access to the process.

As a remedy, the Court in *White* ordered Texas to adopt single-member districts in Dallas and Bexar Counties. The Court said nothing about how many, if any, of these single-member districts African-Americans or Mexican-Americans should control. Thus, the Court got rid of one system that it found diluted voting strength, but replaced it with another that might—or might not—also dilute voting strength, depending on how the district lines were drawn. The Court did not say how much representation African-Americans or Mexican-Americans should have under the new system.

White was not the only case in which the Court applied the concept of comparative vote dilution without addressing the underlying issue of voting strength. In *City of Richmond v. United States*,[138] the voting strength of African-Americans in Richmond, Virginia, was alleged to have been diluted as a result of municipal annexation of certain predominantly white areas. Prior to annexation, blacks constituted 52 percent of the city; following annexation blacks would make up 42 percent of the population. Clearly, in the at-large city

137. 412 U.S. 755 (1973).
138. 422 U.S. 358 (1975).

council elections, black voting strength would be less than it had been prior to the annexation.

The Court, however, was unwilling to turn any particular percentage of voting strength into an absolute right. The Court would neither disapprove the annexation nor require the City of Richmond to accord blacks the same voting power they had had prior to annexation. Rather, the Court held that so long as Richmond made certain changes in its voting procedures such that the system "fairly reflect[ed] the strength of the [African-American] community as it exist[ed] after the annexation," the annexation could proceed.[139] The Court did not explain what it meant by "fairly represent[ing] the strength of the [African-American] community." Without some theory of what representation a group is entitled to, this concept is extraordinarily vague. The Court may well have meant a true percentage group representation—that districting would have to be such that the 42 percent black population in the new Richmond could elect 42 percent of the city council. If so, the Court may actually have been adopting demographic proportionality as the answer to the districting conundrum. It seems more likely, however, that the Court simply did not intend to answer the question.

The Court was similarly able to avoid the question of appropriate minority voting strength in *Beer v. United States.*[140] In *Beer,* black citizens challenged a redistricting plan for city council elections in New Orleans that created one majority-minority district. Plaintiffs argued that the plan abridged their voting rights because, taken as a percentage of the whole (either populace or voters), blacks should have been able to elect more than one member of the city council. The jurisdiction in *Beer,* as in *City of Richmond,* was covered by section 5, so the Court was able to duck the question of what voting strength was appropriate for the black community in New Orleans by limiting its analysis to temporal vote dilution. The Court ruled that because the plan improved black voting strength over what it had been before, it did not violate the Voting Rights Act, which merely prohibited the diminution of black voting strength.

139. This portion of the Court's ruling, however, was qualified by its holding that even if the annexation had no adverse impact on the voting rights of African-Americans and did not in fact reduce their voting strength, it should nonetheless be undone if the only purpose for the annexation was an intent to reduce African-American voting strength.

140. 425 U.S. 130 (1976).

The problem arose again the following year in *United Jewish Organizations v. Carey.*[141] In *UJO,* the Justice Department concluded, following the 1970 census, that New York City ought to have two legislative districts in which blacks constituted 65% of the electorate.[142] It appears that in making this determination, the Justice Department was simply applying the same standard of group representation that the Court had used in *City of Richmond,* requiring that the voting strength of African-Americans mirror their percentage in the population. In *UJO,* this result was achieved by dividing the community of Hasidic Jews in the Williamsburg section of Brooklyn, which had previously been concentrated in one district, into two districts. The Hasidic community sued, alleging that *their* voting power had been diluted.

The Court upheld the districting plan. Writing for a plurality, Justice White proclaimed that "the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts . . . ."[143] Moreover, in language with great significance for the *Shaw* case, White stated that "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment."[144]

Justice White then went on to address the more difficult issue. He noted that in order to draw a black majority district, a State "must decide how substantial those majorities must be."[145] In other words, the State must choose a quota. Because some number must be chosen, Justice White reasoned, "a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts."[146] The remaining question was whether the particular quota chosen and the particular district chosen were somehow improper. New York and the United States argued that the percentage chosen was proper because "the percentage of districts with a nonwhite majority roughly approximate the percentage of nonwhites in

141. 430 U.S. 144 (1977).

142. Because New York was subject to the preclearance provisions of § 5 of the Voting Rights Act, New York's congressional reapportionment, necessitated by the 1970 census, had to be approved by the Justice Department.

143. *UJO,* 430 U.S. at 161.

144. *Id.*

145. *Id.* at 162.

146. *Id.*

the county."[147] The plurality, however, found it unnecessary to reach this argument, holding instead that the percentages were proper because they had been chosen by the Attorney General and were reasonable.[148] Thus, the Court once again avoided the question of what amount of voting power is appropriate for a minority community, in effect reserving that question for the Justice Department or for local authorities to decide.

In *City of Port Arthur,*[149] the Court once again avoided deciding how much voting power is appropriate for a minority group, but in doing so, it deferred to a lower court ruling that came very close to requiring fairly strict population proportionality. In *Port Arthur,* accompanying two consolidations and an annexation that altered the racial balance in the City of Port Arthur, the city made changes to its city council electoral structure. The council had previously consisted entirely of at-large representatives. Under the proposed new structure, some council members would be elected at large, while others would be elected from districts. The district court required that an additional change to the electoral structure be made, eliminating the majority-vote requirement for certain of the at-large seats. In affirming, the Supreme Court deferred to the district court, in part because "whether the . . . plan adequately reflected the political strength of the black minority in the enlarged city was not an issue that could be determined with mathematical certainty."[150] But even if that lack of certainty required the Supreme Court to defer, *someone,* in this case the district court, had to decide whether the plan "adequately" reflected the political strength of the black community. What is most interesting about the *Port Arthur* case is that the district court finding to which the Supreme Court deferred was that the plan, unmodified, would have undervalued the political strength of the black community because the black community could be expected to elect one-third of the seats, but blacks made up 40.56% of the population and 35% of the voting population. It was only the Supreme Court's deference to the district court that prevented the higher court from having to deal directly with the question of whether or not one-third of the seats was the right answer to the districting conundrum.

Thus, it would appear that the districting conundrum has lurked behind the concept of group vote dilution for almost as long as the

147. *Id.* at 165.
148. *Id.* at 162-64.
149. City of Port Arthur v. United States, 459 U.S. 159 (1982).
150. *Id.* at 167.

Supreme Court has employed it. Thus, the Court's subsequent discovery in *Holder* that communal representation turns on a resolution of this question should have come as no surprise.

Once the group theory of representation pushes us to answer the districting conundrum, we can begin to see the problems that arise if we try to do so. One problem is the fundamentally essentialist nature of group representation. Group representation assumes that members of the group will actually be represented if the group is represented. As with "virtual representation," this assumes that what is most fundamental, most essential, about such individuals is their participation in the group. The group theory of representation thus has the effect of reducing a multitude of diverse individuals into a single set of interests, assumed to be shared by all members of the group. In asking how many representatives we should allocate to African-Americans, we assume that for each African-American, her African-Americanness is the most significant aspect of her self, the aspect for which she most wants representation. That she, as an *individual* may have perspectives and interests different from other African-Americans is glossed over. What underlies the distress many people feel over "race-based" districting is precisely this concern—that by allocating representation on a group basis, we are legitimizing and institutionalizing stereotypical notions about each group.[151]

But even if we decide that the vices of essentialism are less critical than ensuring adequate representation for historically disadvantaged groups that by and large will have similar interests and perspectives, we still have the problem of defining which groups will

151. This tendency towards stereotyping and solipsism has been aptly described by Elizabeth Spelman: "[E]ssentialism invites me to take what I understand to be true of me 'as a woman' for some golden nugget of womanness all women have as women; and it makes the participation of other women inessential .... How lovely: the many turn out to be one and the one that they are is me." ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 159 (1988), *quoted in* Harris, *supra* note 83, at 589. Professor Harris criticizes feminist essentialism because it glosses other racial and other differences among women. *Id.* at 585, 595-604. Similarly, critics of racial essentialism point to its tendency to gloss over differences among members of a racial group, to treat them as if they are all alike. *See, e.g.,* Aleinikoff, *supra* note 83, at 1060; Randall Kennedy, *Racial Critiques of Legal Academia,* 102 HARV. L REV. 1745, 1782-83, 1801-07 (1989).

Of course, as Professor Aleinikoff points out, "to reject 'essentialism' is not to deny the significance of the color line in American life," because we can recognize that black and white experiences may be somewhat different from one another without the reductionism that collapses all black or all white experience into each other. Aleinikoff, *supra* note 83, at 1094.

be entitled to representation—for which communities will we attempt to answer the districting conundrum?

The problem of defining which communities will be entitled to representation was starkly illustrated in the *UJO* case. The Court upheld the districting plan there, refusing to recognize that the plaintiffs constituted a distinct ethnic community. Rather, treating the members of the Hasidic community simply as white voters, Justice White wrote that "there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength."[152] The Court's rejection of the Hasidic Jews' position does not reflect any inconsistency in the Court's communal approach; the Court simply did not recognize that there was another community whose rights were at issue.

The *Gingles* test, which of course did not exist at the time *UJO* was decided, only highlights the difficulty. Although it is possible that the Hasidic Jews in *UJO* could qualify under *Gingles* as a group whose representation could not be diluted, that result would depend on treating "Hasidic Jews" as a separate group for purposes of the test. If we treat the plaintiffs in *UJO* merely as "white voters," we do not need the *Gingles* test to tell us that the Court will not protect their voting strength. Nor is it obvious that it should. The problem is that it is simply not obvious whether for voting purposes these Hasidic Jews should be treated as white, or Jewish, or Hasidic, or something else altogether.

If we are serious about communal representation, we must eventually move past the bimodal, "black-white" view of the world that recognizes only two categories of voters, black and white. In *De Grandy,* the Court had no trouble recognizing that there were three groups of voters in Florida, black, white, and Hispanic, although it could not solve the problem that increasing the voting strength of either African-Americans or Hispanics would have the effect of diluting the voting strength of the other.[153] As the population of the

152. *UJO,* 430 U.S. at 165. It is not clear that Hasidic Jews are a protected group under the Voting Rights Act, which forbids a denial or abridgment of the right to vote on account of "race or color . . . ." On the other hand, the Hasids might qualify as a Yiddish-speaking language minority protected by 42 U.S.C. § 1973b(f)(2) (1988) and incorporated by reference into § 2.

153. The court below in *De Grandy* found two separate Voting Rights Act violations, one pertaining to African-Americans and the other pertaining to Hispanics. The Court found, however, that the remedies for these two violations were mutually exclusive, and declined to order relief at all.

United States becomes increasingly diverse, the number of groups whose voting strength we will have to consider will only increase. It is difficult to imagine how we will decide which groups qualify.

Even the very notion of distinct groups may prove more elusive than one might expect. Efforts by federal agencies to devise racial categories to be used with the next census reveal how difficult it is to classify a racially and ethnically diverse population and how fluid the categories devised inevitably will be.[154] Unfortunately, this does not mean that race has become irrelevant in American society, or that group representation along racial and ethnic lines is meaningless. Rather, it suggests that official attempts to define and contain these categories can be expected to meet with dubious success. Further, even if we could easily classify the population of the United States along racial and ethnic lines, it is not clear that we would want to.

Moreover, categories other than race may be seen as significant here—gender, sexual orientation, disability, all of these qualities may be seen as equally valid bases of representation. Who will decide in which category a voter is to be counted? If we parcel out representation by race, does that mean that women's votes are forever fragmented? If we parcel it out by gender, will issues of race be ignored? In order to decide the districting conundrum, someone is going to have to assign voters to distinct categories, so that we can figure out how many voters of each group we have, make our chart, and choose our result.

The prospect of the government assigning each voter to one and only one group and allocating representation among those groups is not an attractive one. These problems certainly give one pause about efforts to answer the districting conundrum.

In 1993 and 1994, the Supreme Court was confronted with cases that posed these issues of communal representation perhaps more sharply than before. Recognizing the difficulties raised by communal representation and efforts to answer the districting conundrum, the Court seemed poised to abandon the inquiry. Unfortunately, in doing so, the Court was responding to only one branch of the paradox—having forgotten that ignoring the districting conundrum is at least as bad as trying to answer it.

154. *See, e.g.*, Lawrence Wright, *One Drop of Blood*, THE NEW YORKER, July 25, 1994, at 46, 46-50.

IV. *Shaw, De Grandy,* and *Holder* and the Future of the Voting Rights Act

In *Shaw, De Grandy,* and *Holder,* the Supreme Court discovered the implications of the communal theory of voting, in much the way that it discovered the implications of the individual approach in *Allen* and other similar cases. In *Shaw,* the court seemed shocked to discover that majority-minority districts were deliberately created with race in mind, and did not simply occur as the result of some race-blind process. In *Holder,* the Court was squarely faced with the prospect of having to decide what the voting strength of African-Americans ought to be, and in *De Grandy,* the court was confronted with the argument that demographic proportionality was the right answer to the districting conundrum. Confronted with the hard questions about communal representation, the Court showed itself inclined to give up and return to individual representation.

A. *Shaw v. Reno*

The Court's 1993 opinion in *Shaw v. Reno*[155] exposes, but does not solve, many of the underlying problems in the communal approach to representation. Prior to *Shaw,* majority-minority districts, drawn to effectuate a communal approach to representation, generally coincided with geographic regions. That is, such districts were drawn in areas of racially-segregated housing patterns, where a majority-minority district might look, on a map, like any other politically-drawn district. In *Shaw,* however, the Court confronted the question of what happens when race-based districting becomes divorced from geography.

The North Carolina district that was challenged in *Shaw* did not look like a regularly-drawn district. It was approximately 160 miles in length, and no wider than Interstate 85, which it followed. As the Court noted, "Northbound and southbound drivers on I-85 sometimes find themselves in separate districts, only to 'trade' districts when they enter the next county . . . . At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them."[156] Suddenly, when the Court looked at the map, it was obvious that District 12 was a race-based district.

Not that this should have been a surprise to anyone. The district was created after the North Carolina General Assembly submitted a

155. 113 S. Ct. 2816 (1993).
156. *Id.* at 2821.

proposed redistricting plan to the Justice Department for preclearance in accordance with section 5 of the Voting Rights Act. The Attorney General objected to the plan, on the basis that the General Assembly could have created another majority-minority district "to give effect to black and Native American voting strength," but had failed to do so.[157] The General Assembly then revised the plan, adding District 12. Thus, no one should have been surprised that this majority-minority district did not simply arise magically from the local geography, but instead had been deliberately constructed.[158]

Plaintiffs, white voters in North Carolina, challenged the district as violative of the 14th Amendment guarantee of equal protection. Plaintiffs did not allege that the voting strength of white voters had been diluted, but rather that drawing districts on the basis of race was itself unconstitutional, regardless of the effect on the voting strength of a particular group. Thus, *Shaw* did not so much challenge District 12 as it challenged the very notion of race-based districting.

Confronted with the question in this form, the Court held that race-based districting is subject to strict scrutiny under the Fourteenth Amendment. Although the opinion paid lip-service to *Allen* and other cases dealing with the minority voting strength, the case reveals a Court uncomfortable with the implications of this approach, finding that districts drawn along racial, rather than geographic, lines "bear[ ] an uncomfortable resemblance to political apartheid."[159]

The role of geography here is somewhat incoherent. If it is impermissible to assign voters to districts on the basis of their race, why should it matter how the district to which they are assigned is shaped?[160] Or put the other way, if it is permissible, indeed desirable, to assign voters to districts on the basis of their race—and the Court

157. *Id.* at 2820.

158. The process by which the twelfth district was drawn in North Carolina was somewhat similar to the process by which the electoral districts at issue in *UJO* were drawn, that is in response to criteria from the Justice Department. The two cases highlight the difference between districting in a dense urban area and districting in a rural area. In Brooklyn, no matter how the lines were drawn, the districts were reasonably "compact," in that they covered little geographic territory. In *Shaw* the district sprawled, because the low population density meant that the more territory was needed to capture the requisite number of voters. This suggests that it is easier to "hide" majority-minority districts in cities than in rural areas, although it is difficult to see why anything of significance should turn on this difference.

159. *Shaw,* 113 S. Ct. at 2827.

160. Justice White made exactly this point in his dissent in *Shaw*: "Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like, at least so far as the Constitution is concerned and absent any evidence of differential racial impact." *Id.* at 2841.

has repeatedly said that it is—how can it become impermissible to do so when the district to which they are assigned is irregularly-shaped? The Court in *Shaw* seemed to say that race-based districting is permissible only when one can't tell from looking at a map that it has been used and it is therefore possible to pretend that the "majority- minority" district simply "happened" without anyone ever deliberately drawing district lines on the basis of race.

A certain amount of spin has been employed to justify this holding. Justice O'Connor explained that districting was an area in which "appearances do matter,"[161] and others have accepted this explanation and elaborated on it.[162] While it may be true, however, that for political purposes appearances matter, the notion that appearances could rise to constitutional dimension seems fundamentally wrong. To say that a districting system is constitutional only when its guiding principles are concealed seems to be nothing more than institutional-

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It would now appear that the majority of the Supreme Court now agrees. Shortly before this article went to press, the Court decided Miller v. Johnson, 115 S. Ct. 2475 (1995), in which it invalidated a Georgia majority-minority district, which although not "bizarre" on its face was, the Court found, nonetheless drawn predominately to create an additional "majority-minority" district. In his majority opinion, Justice Kennedy wrote, "Our observation in *Shaw* of the consequence of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation." *Id.* at 2486. Rather, explains the *Miller* decision, bizarreness is just one indication of an improper use of race in districting.

161. *Shaw,* 113 S. Ct. at 2827. Not everyone agrees with Justice O'Connor's assessment, however. Taking the other point of view, Louisiana State Senator Dennis Bagneris, speaking of the district court's decision on remand to dismiss the *Shaw* case and comparing it to a Louisiana racial gerrymandering case, asserted, "People vote and will always vote along racial lines. What difference does it make whether the district looks pretty?" *2 States, 2 Rulings On Race Districting; Supreme Court May Have To Decide,* CHICAGO TRIB., Aug. 3, 1994, at A4.

162. Pildes and Niemi attempt to argue that appearances matter because a district that *looks* racially drawn makes a statement that race is the only important value. Pildes & Niemi, *supra* note 11, at 499-506. This appears to be wrong on two counts. First, if "value-reductionism," the simplification of the political process so that only one value, rather than many, are taken into account, is wrong, then it ought to be equally wrong whether it is obvious or obscured. If the legislative decision-making process has been corrupted in some way that we care about, it is hard to see why it should be actionable only when it is obvious. (Indeed, it is far from clear why this problem would be subject to judicial review at all.) Second, the assumption that obvious race-based districts arise from value-reductionism in the first place is flatly contradicted by the facts of *Shaw* and questionable in any circumstance. In *Shaw,* it is clear that had race been the only consideration, a majority-minority district could easily have been drawn that would have been far more compact than the actual district that was challenged. The bizarre shape of the district arose from the opposite of value-reductionism—the efforts of the legislature to accomplish political and racial goals simultaneously. *See Shaw,* 113 S.Ct. at 2842 n.10; *see also* Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act,* 92 MICH. L. REV. 652, 653 (1993).

ized hypocrisy, and as such, I am skeptical that it could be constitutionally required.

I believe that *Shaw* exposed the districting conundrum in a way that made the conundrum particularly clear to the public and to the Court. Without the distractions of geography, the Court could see that what race-based districting asks is whether we should try to decide the answer to the districting conundrum—whether we should try to district in such a way as to produce a particular one of the outcomes on the chart in Table 1. In this regard, it is significant that the plaintiffs did not allege that they, the white voters, had been allocated less representation than they should have received. (Indeed, they did not even allege that they were white.[163]) Rather, they challenged the very idea that an outcome—any outcome—should be chosen at all. Thus, the *Shaw* plaintiffs were not contending that North Carolina had come up with the wrong answer to the districting conundrum; their point was that the districting conundrum should not be addressed at all.

The *Shaw* Court did not entirely accept this argument. To the extent that the *Shaw* case posed the question, "Should we care about the districting conundrum," the court gave an equivocal answer. The answer seemed to be that yes, we should—or at least we may—care about the districting conundrum, so long as doing so does not result in bizarre-looking districts. Even then, the Court left open the possibility that we might still draw districts to achieve a particular racial allocation of representation, so long as the plan was "narrowly tailored to further a compelling governmental interest."[164] The Court seemed to be saying that under certain circumstances, it is constitutionally permissible for states to consider the districting conundrum.

One year later, in *Holder,* the Court showed itself less sympathetic to the notion that the Voting Rights Act could be used to require states to consider the districting conundrum if they were not otherwise inclined to do so.

B. *Holder v. Hall*

In *Holder v. Hall,*[165] the Court was presented with a straightforward application of the communal approach to representation. As in *Allen,* it was the African-American community, rather than any individual voters, that was being denied representation. But *Holder,* like

163. *Shaw,* 113 S. Ct. at 2822.
164. *Id.* at 2832.
165. 114 S. Ct. 2581 (1994).

City of Richmond, Beer, and *UJO,* once again raised the question of what the correct voting strength of African-Americans should be.

In *Holder,* six African-American registered voters and the local NAACP chapter in Bleckley County, Georgia, brought constitutional and Voting Rights Act challenges to the county's single-commissioner form of government. Bleckley County has been governed by a single commissioner since the county was founded in 1912. Although African-Americans make up 20% of the population in Bleckley County, no black person has ever run for, or been elected to, the office of Bleckley County Commissioner. In 1985, the Georgia legislature authorized Bleckley County to adopt a multimember commission consisting of five commissioners elected from single-member districts and a single chairman elected at large. Bleckley County elected not to make this change in its county government. Plaintiffs then sued the incumbent county commissioner and the superintendent of elections in federal district court, seeking imposition of the five-member commission.

The district court dismissed both the statutory and constitutional claims, despite the judge's explicit recognition of racist voting patterns in the county.[166] The Eleventh Circuit reversed on the statutory claim and held that plaintiffs had proved a violation of section 2 of the Voting Rights Act. It remanded the case to the district court for formulation of a remedy. The Eleventh Circuit did not consider the constitutional claim. The Supreme Court then granted certiorari on the Voting Rights Act claim.

What the plaintiffs were asking the Court to do in *Holder* was simply to declare that the districting conundrum mattered in Bleckley County, even if the state didn't think so, and that zero was an inappropriate answer to the question of how much representation a 20% minority ought to have. But the Court was unwilling to impose the districting conundrum on a state that had not attempted to answer it: as the Court conceived the question, it could not say that zero was an inappropriate answer to the districting conundrum unless it knew what an appropriate answer would be.

Ironically, the facts of *Holder* present a fairly easy situation for solving the districting conundrum. The state had authorized a five-person commission; if appropriately districted, such a commission could allocate one representative, that is 20%, to the African-Ameri-

166. As set forth in *Holder,* "The District Judge stated that, having run for public office himself, he 'wouldn't run if he were black in Bleckley County.'" *Id.* at 2584.

can community, which coincidentally made up 20% of the populace. The majority in *Holder,* however, was unable to accept this answer, because there was no principled basis from which the answer was derived—it appeared to be just coincidence that the number of commissioners authorized by the state permitted representation corresponding to the percentage of African-Americans in the county.

Thus, in *Holder* the Court looked at the districting conundrum and couldn't figure out how to begin to answer it. Because the Court could not determine what the answer to the districting conundrum should be, it refused to order the state to attempt to answer it.

The Court's decision in *Holder* consists of six separate opinions, none of which commanded a majority: (1) Justice Kennedy wrote an opinion that was joined by Justice Rehnquist and, except for part II.B, by Justice O'Connor; (2) Justice O'Connor wrote an opinion in which she concurred in part and concurred in the judgment; (3) Justice Thomas, joined by Justice Scalia, concurred in the judgment; (4) Justice Stevens wrote an opinion that was joined by Justices Blackmun, Souter and Ginsburg, and that was designated as neither a concurrence nor a dissent; the opinion took no position on the outcome of the case, but rather responded to Justice Thomas's opinion; (5) Justice Blackmun, joined by Justices Stevens, Souter, and Ginsburg, dissented; and (6) Justice Ginsburg wrote her own, separate dissent.

The three opinions which constitute the majority result in *Holder* show five of the justices struggling to find some way to avoid taking on the districting conundrum, in order to avoid confronting a question they were unwilling to answer. Justice Kennedy cut off the challenge at the earliest possible moment, arguing that the size of government was not a "standard, practice or procedure" within the meaning of section 2. Justice Kennedy concluded that "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under section 2."[167] Kennedy noted that in cases arising under section 5, there is automatically a benchmark—that is, section 5 cases present issues of temporal vote dilution only. Kennedy was unwilling to expand this analysis to comparative vote dilution. To avoid doing so, he concluded that, although the size of government might well be a "standard, practice or procedure" under section 5 of the Voting Rights Act, it is not a "standard, practice or procedure" within the meaning of section 2.

167. *Id.* at 2586.

Kennedy's argument has a certain logic, but is nonetheless unconvincing, primarily because of the language of the Voting Rights Act itself. The logic of the argument arises from the correspondence between, on the one hand, section 5 and what I have called temporal vote dilution, and the other hand, section 2 and what I have called comparative vote dilution. These are two different kinds of vote dilution, and they raise entirely different issues with respect to the question of a benchmark. Justice Kennedy's decision, hinging on the difference between section 5 and section 2, seeks to make use of this difference.

The problem is that this is a distinction that Congress did not make. The language in section 2 is identical to the language in section 5. Moreover, there is good reason to believe that, if anything, the coverage of section 2 is broader than the coverage of section 5. Kennedy is unable to cite anything in the text or history of section 2 or section 5 to support his notion that the identical phrase should be read differently in these two different contexts. His argument proceeds from its conclusion: it would be awkward and difficult (and, presumably, unwise) to allow this challenge; therefore, the challenged practice must not be a "standard, practice, or procedure." Kennedy's argument is a wishful one, based on the statute he wishes Congress had written, one that would have been easier for the Court to interpret and enforce, rather than the statute that Congress actually wrote. Essentially, Kennedy would have us believe that Congress meant two different things when it used the exact same phrase, because interpretation would be so much easier if they had.

Justice O'Connor was unwilling to take such an easy way out in her efforts to get to the same place. She recognized that it was not simply not possible "to read the terms of section 2 more narrowly than the terms of section 5."[168] She concluded therefore, that the size of government is a "standard, practice, and procedure" within the meaning of section 2, and directly addressed the problem of comparative vote dilution.

This approach avoids the most obvious problems with Justice Kennedy's analysis, but presents problems of its own. Once O'Connor had determined that the size of the government might be a challenged under section 2, she needed to come up with some argument why it could not be so here. She concluded that although the

168. *Id.* at 2588 (O'Connor, J., concurring).

size of the government was subject to section 2, a challenge to that size based on vote dilution was not.

This is an extraordinary argument, for it is difficult to imagine what other kind of challenge there could possibly be under the Voting Rights Act to the size of government. O'Connor grounded this argument in the purported lack of an "objective benchmark" for comparative vote dilution cases. Curiously, however, she did not argue that an objective benchmark was lacking on the particular facts in front of her, but rather concluded that "in a section 2 dilution challenge to size, there can [never] be an objective alternative benchmark."[169] Thus, although she arrived at Justice Kennedy's conclusion through a slightly different route, the difference is really one of language, not substance. By holding that vote dilution challenges can never be made to government size under section 2, given that this is the only kind of meaningful challenge to government size, she in effect concluded that governmental size is not a "standard, practice, or procedure." And, like Justice Kennedy, she reached this conclusion by focusing on the difference between section 5—in which the challenge was a temporal one, and thus had what O'Connor calls an "objective alternative benchmark"—and section 2, in which the challenge was a comparative one, and therefore, according to Justice O'Connor had no such benchmark.

Justice O'Connor's opinion is a marvel of slippery-slope-ism. For in fact, in the case before her, there was an easily ascertainable, objective benchmark—the five-person commission that the state had authorized the county to adopt. Coincidentally (or perhaps not), this happened to correspond to the number of commissioners needed to give African-Americans, who made up one-fifth of the county, representation in approximate proportion to their numbers. The problem for O'Connor then was of the "where will it all end" sort. If we say that zero representation is too little, how will we avoid saying how much is enough? And once we decide how much is enough for one group, how will we avoid saying how much is enough for every group? What if the state had authorized five commissioners, but the African-American population was only 15 percent, not enough to control one of the five seats?[170]

These are not trivial problems, and it is to Justice O'Connor's credit that she recognized them. But her opinion, like Justice Ken-

169. *Id.* at 2589.
170. *Id.* at 2590.

nedy's, adopted a backward form of reasoning to avoid actually grappling with these hard questions. It concluded that because allowing a section 2 challenge based on comparative dilution would eventually force the Court to confront these sticky issues, such a challenge must be impermissible. Put another way, both Justice O'Connor and Justice Kennedy concluded that the size of Bleckley County's government could not be challenged because to do so would require the Court to recognize the districting conundrum *and,* more significantly, to find an answer to it. It is precisely to avoid coming up with an answer to the districting conundrum that the majority in *Holder* concluded that governmental size is not subject to a vote-dilution challenge. It is important to note, too, that the majority gave no principled reason for avoiding the districting conundrum, other than the difficulty of answering it. That is, both Justice Kennedy and Justice O'Connor suggested that if only there were a benchmark, a standard by which they could evaluate the districting conundrum, they might be willing to do so. Only because they could not figure out how a court could answer it, however, did the majority justices conclude that the question must be avoided.

Curiously, both Kennedy and O'Connor based their holdings on the allegedly standardless nature of the inquiry the Court would be forced to conduct without once mentioning the term "justiciability." Surely a holding that a claim cannot be entertained because of "a lack of judicially discoverable and manageable standards for resolving it"[171] would seem to be a holding on the grounds of nonjusticiability. Moreover, the two majority opinions in *Holder,* which *together* total fewer than 10 pages, stand in stark contrast to the exhaustive discussion of justiciability in *Baker v. Carr,* in which the Court determined that vote dilution challenges to legislative districting were justiciable.

Nor is it clear that a rigorous justiciability analysis would have led to the same conclusion as the one that Kennedy and O'Connor reached. After all, as noted above, the Court had on numerous occasions considered whether districting arrangements were dilutive of minority voting strength without attempting to answer the potentially nonjusticiable question of what the appropriate voting strength of the group should be.[172] Indeed, in *White,* the court had gone so far as to strike down a multimember districting scheme as dilutive, without ever addressing what it would consider to be an undiluted voting

171. The Court used precisely this language in *Baker v. Carr* to describe one of the categories of nonjusticiable cases. Baker v. Carr, 369 U.S. 186, 217 (1962).

172. *See supra* text accompanying notes 28-41.

strength in that case. Why *Holder* should be any less justiciable than *White* is difficult to see. Nonetheless, a majority of the justices in *Holder,* realizing the difficulty of answering the districting conundrum and actually determining appropriate voting strength, chose instead to ignore the conundrum.

In his 23-page *Holder* concurrence, Justice Thomas (joined by Justice Scalia) took a different approach, urging the Court to limit the scope of the Voting Rights Act to issues of ballot access and vote counting,[173] thus defining the districting conundrum out of existence. In Thomas's view, "[A]s far as the Act is concerned, an 'effective' vote is merely one that has been cast and fairly counted."[174] In essence, Thomas would overrule *Allen* and virtually every Voting Rights Act case since then, and would hold that the Voting Rights Act has nothing to say about the result of the districting conundrum.

Thomas's rejection of the districting conundrum arises directly from his rejection of anything that smacks of communal representation. Asserting (with very little basis) that section 2 is focused on the "individual voter," he concludes that "[g]iving the term 'standard, practice or procedure' an expansive interpretation to reach potentially dilutive practices . . . would distort that focus on the individual, for a vote dilution claim necessarily depends on the assertion of a group right."[175] Thus, Thomas would hold that "standard, practice or procedure" "reach[es] only state enactments that limit citizens' access to the ballot."[176] Thomas is calling for a return to a purely individual notion of representation and an out-and-out rejection of communal or group representation.

Thomas made two distinct arguments in support of his position. First, he argued that any other approach amounts to a judicial implementation of what he calls "political theory," and second, he argued that the Voting Rights Act itself requires his interpretation.

173. *Holder,* 114 S. Ct. at 2602.

174. *Id.* at 2605 (Thomas, J., concurring).

175. *Id.* Thomas's argument that the Voting Rights Act incorporates a purely individual notion of representation appears to arise solely from the fact that § 2(a) refers to the right of "any citizen" to vote. Thomas argued that because "any citizen" is singular, the focus of the Act must be on the individual. This ignores not only the possibility that the singular was chosen for grammatical convenience, but also the fact that while § 2(a) is arguably focussed on individual voters, § 2(b) clearly speaks of "members of a class of citizens," as well as safeguarding the rights of such class members "to elect representatives of their choice," a phrase, which as we have seen, can only refer to a communal conception of voting and representation.

176. *Id.* at 2592.

Thomas's political theory argument was simply that the group theory of representation results from a particular choice of political theory. Thomas treated "political theory" as if it were a dangerous animal, to be avoided at all costs. It was sufficient for him to brand an idea as nothing but "political theory" for him to conclude that the idea must therefore be rejected out of hand. It never seemed to occur to Thomas that the Constitution and the Voting Rights Act represent political theory choices, which it is then the Court's obligation to interpret and enforce.

Thomas understood, and made explicit as the other justices seem unwilling to do, that geographic representation itself is nothing more than a political theory choice. Once we begin to shift to a group-centered notion of representation, geography may well have to be abandoned. Thomas saw, too, the Court's hypocrisy in permitting race-based districts only when the districts are drawn in such a way that one cannot tell, from looking at a map, that they are in fact race-based, while shying away from race-based districts as soon as they look like what they are. Thus, Thomas noted that "rather than requiring registration on racial rolls and dividing power purely on a population basis, we have simply resorted to the somewhat less precise expedient of drawing geographic district lines to capture minority populations."[177]

Thomas recognized, in the second half of his opinion, that his notions of "political theory" depend on a particular interpretation of the Voting Rights Act and he turns to the Act to argue that it supports his version of political theory, rather than that of his opponents. It is here that his argument falls apart.

Thomas made two arguments about the Voting Rights Act. First, he argued when Congress amended section 2(a) in 1982, it was not thereby incorporating and enacting the group notions of representation found in the *Allen* case. Thomas conceded that the Court "generally will assume that reenactment of specific statutory language is intended to include a 'settled judicial interpretation' of that language,"[178] but argued that *Allen* did not, in 1982, represent the settled judicial interpretation of section 2. *Allen* was already 13 years old in 1982, so Thomas needed some fancy footwork here. He got around the point with a quick and superficial argument: *Allen* was a section 5 case; there was no reason to conclude, in 1982, that it applied to sec-

177. *Id.* at 2599.
178. *Id.* at 2606.

tion 2 as well. What this argument misses is that by 1982, *Allen* was hardly the only case adopting an expansive, group-centered view of the Voting Rights Act. As noted above, by 1982, the group approach to representation was well-entrenched in cases interpreting the Voting Rights Act. Moreover, although some of these other cases were, like *Allen,* section 5 cases, some, like *City of Rome,* were in fact brought under section 2.

Thomas argued that the Court should look to *Mobile* rather than to *Allen* as the last word on section 2 at the time of the 1982 re-enactment of the Voting Rights Act. Thomas seems somehow to have overlooked the fact that Congress amended and reenacted the Act in 1982 precisely to overrule *Mobile.* Thus, the notion that Congress was incorporating *Mobile* is simply untenable. Moreover, to the extent that Congress intended to incorporate into the 1982 amendments those portions of the *Mobile* opinion that it did not expressly overrule, *Mobile* itself adopts and applies the *Allen* concept of group vote dilution which arises from a group theory of representation.

Thomas found an even greater challenge in his attempt to deal with section 2(b) of the Act. After all, section 2(b) commands the Court to look at whether members of a minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Congress's use of this phrase refutes Justice's Thomas's argument that the Voting Rights Act is limited to questions of ballot access and counting. Congress could not have made it clearer that it intended the Court to look at the results of elections, and that if minority groups did not have a chance actually to *elect* (not merely to vote for) representatives of their choice, then they had not been accorded the full protections of the Voting Rights Act. Thomas essentially ignored this language in order to conclude that the Voting Rights Act has nothing to say about the rights of anyone actually to *elect* a representative.

Thomas ran into even greater difficulty with the language in section 2(b) that directs the court to consider "the extent to which members of a protected class have been elected to office." Thomas recognized that he must explain away this language if his argument was to stand. Thus, he argued that this factor is included because it could conceivably be used as a surrogate for other information to show that members of a group were denied access to the polls. And while one cannot say that these words *couldn't* mean what Thomas says, that is hardly their most natural or plainest meaning. For a pair of self-proclaimed textualists, Justices Thomas and Scalia are remark-

ably uninterested in the text that Congress actually wrote, as opposed to the one they believe Congress ought to have written.

What Thomas so fears that he is willing to turn the clock back to 1969 to avoid, is representation based on demographic proportionality. That Thomas fears this most strongly of anyone on the Court is not surprising, as it is most obviously threatening to him. Demographic proportionality assumes that members of a group are more like one another than they are like members of other groups. Moreover, the government determines to which "group" an individual belongs. As a conservative Republican African-American, Thomas may feel quite strongly that being grouped with other African-Americans will not cause *him* to be better represented; his opinion in *Holder* demonstrates how acutely aware he is that not all African-Americans think alike, and that to be assigned to an "African-American district" would disenfranchise him as surely as the African-American community is disenfranchised in Bleckley County.

In order to avoid this, Thomas is prepared to return to a pre-*Allen* understanding of voting rights. He is apparently willing to accept a narrowed focus that would be incapable of discerning racial discrimination so long as every individual gets to cast a ballot, and to sanction elections that could be little more than a sham, the result determined in advance through manipulation of district lines. He is so focused on what he believes to be the dead end ahead of him, that he is oblivious to the fact that the road he is switching to leads equally to a dead end.

In an opinion labelled neither a concurrence nor a dissent, and addressed solely to the Thomas-Scalia concurrence, Justice Stevens made this point. Stevens provided a history of the Voting Rights Act, and the cases under it, a reminder that there was a reason that Congress and the Court began to use a group notion of representation in the first place. Thomas touted individual representation as the panacea for the problems of Voting Rights Act jurisprudence; Stevens reminded him that individual representation has already been tried, and its problems were at least as serious as the ones raised by the group approach.

The dissenters in *Holder* didn't do much better than those in the majority at confronting the difficult issues of representation inherent in the case. Instead, Justice Blackmun, writing for himself and Justices Stevens, Souter, and Ginsburg, found that he didn't have to. The questions raised by Justice O'Connor may indeed be hard questions—in another case. The facts before them, however, are not so difficult.

As Justice Blackmun made clear, a majority of the Court in *Holder* held that governmental size is a "standard, practice, or procedure" within the meaning of section 2. Given that holding (and unlike Justice O'Connor, the fifth justice who agreed that governmental size is a "standard, practice or procedure") the dissenters proceeded to the case-specific analysis of the vote dilution challenge before them. On the facts before them, they found a reasonable and objective benchmark in the five-member commission authorized by the state. They did not decide whether this was the best form of government, or the only form that does not violate the statute. Rather, they would have held only that compared to the benchmark, the form of county government actually employed impermissibly diluted the voting strength of the black community.

Thus, the dissenters leave for another day Justice O'Connor's hard questions: What if African-Americans were only 15 percent of Bleckley County? Would the single-commissioner form of government still be illegal, since the benchmark form wouldn't provide representation either? Would the benchmark itself be illegal? What other groups are there in Bleckley County, and how large do they have to be before they, too, can demand representation in county government? *Holder,* like *Shaw,* avoids these questions by deciding that we need not, should not, address the districting conundrum.

In *De Grandy,* on the other hand, the Court reviewed Florida's answer to the districting conundrum, and in doing so defined certain parameters for dealing with the question. Thus, the Court went from holding, in *Holder,* that the conundrum should not be addressed because there is no basis on which to answer it, to defining, in *De Grandy,* how to go about answering it.

C. *Johnson v. De Grandy*

In *Johnson v. De Grandy,*[179] plaintiffs challenged the new districting plan for the Florida House of Representatives and the Florida Senate. The plan created majority-minority districts for both African-Americans and Hispanics. Plaintiffs alleged, however, that even more majority-minority districts could have been created, and that failure to do so violated the Voting Rights Act. Thus, the plaintiffs in *De Grandy* asked precisely the question we posed at the beginning: How many representatives ought each group to have?

179. 114 S. Ct. 2647 (1994).

The majority opinion in *De Grandy*[180] is notable for its measured approach to this sticky question. Justice Souter rejected outright the notion that the Voting Rights Act, or any of the cases construing it, required Florida to maximize the number of majority-minority districts. Souter used the example that a 40 percent minority could conceivably control seven out of ten seats if maximization were required. Using the figures proposed in Part 1, we saw that a 30 percent minority could control up to 50 percent of the seats, if carefully districted. Given these figures, Souter had no trouble concluding that maximization was not required. (Indeed, confronted with these numbers, it is difficult to make a principled argument for maximization, at least in the general case.)

Florida further argued, however, that the Court should declare demographic proportionality a "safe harbor," so that a plan adopting demographic proportionality could not be challenged.[181] The Court declined to do so, preferring instead to rely in each case on the "totality of the circumstances." The majority's refusal to adopt demographic proportionality as a safe harbor rested on a measured analysis and understanding of the strengths and weaknesses of race-based districting. Souter began by noting that a safe harbor might trade the rights of some members of a minority group against the rights of others, by combining blatant gerrymandering in one part of the State with offsets elsewhere, for an overall proportional result. But the majority's objection to demographic proportionality went much deeper: "It bears recalling," wrote Souter, that

> for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the 'politics of second best' .... If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to

180. There are four opinions in *De Grandy*: Souter wrote for the majority, joined by Rehnquist, Blackmun, Stevens, and O'Connor, and by Kennedy in all but parts III.B.2, II.B.4, and IV; Justice O'Connor wrote a separate concurrence; Justice Kennedy wrote an opinion concurring in part and concurring in the judgment; and Justices Thomas and Scalia dissented in an opinion by Thomas that simply incorporates by reference their concurring opinion in *Holder*.

181. Florida did not go so far as to suggest that population proportionality should be the only correct answer to the districting conundrum. The Court foresaw, however, that if it were to create such a safe harbor, states and local governments would adopt it as the only correct answer, since it would be the only answer that would avoid litigation altogether.

> be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not be slighted in applying a statute meant to hasten the waning of racism in American politics.[182]

Souter tells us that the answer to the districting conundrum is neither five nor three, that there is no "answer," only a case-by-case process of ensuring that minority groups are not disenfranchised while attempting to avoid the worst excesses of race-based districting.

But the majority's measured approach stops short of actually dealing with the districting conundrum. Souter's answer seems to be that if the answer is not egregious, the Courts have nothing to say about it; the question is one for the legislature. Moreover, Souter can articulate no standards for when the answer will be egregious—in drawing district lines that will determine whether the 30 percent minority gets zero, one, two, three, four or five seats, a state or political subdivision can expect no easy guidance from the courts. Even an answer of zero is not always egregious, as in the *Holder* case.

Interestingly, although Souter referred to race-based districting as "second-best," he made no effort to identify what would be best. It is possible that he was referring only to the ideal picture of racial harmony he described as obtaining in some communities—a race-blind world in which there is no districting conundrum, because racial minorities are not treated as distinct units of the polity, so the question of how many seats to allocate simply does not arise. By focusing exclusively on an ideal, however, the majority missed the chance to recognize another way around the problems of individual and communal representation, via proportional representation.

The majority opinion nowhere suggests that such a way out is needed. Souter's opinion suggests a stable, incremental process, in which race-based districting is used, with court approval, when necessary while the populace moves toward a system in which such districting will eventually be obsolete. Justice Kennedy's concurring opinion, however, sounds a wake-up call from this happy daydream.

Kennedy agreed with the majority on the fundamental holdings of *De Grandy,* that maximization of minority representation is unnecessary and that demographic proportionality provides no safe harbor. He agreed, too, that some degree of race-based districting is required

182. *De Grandy,* 114 S. Ct. at 2661 (citations omitted).

by the Voting Rights Act. Unlike the majority, however, he is not comfortable with where this process is leading.

Kennedy noted that "[a]s a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions."[183] He reminded the states to "bear in mind that redistricting must comply with the overriding demands of the Equal Protection clause."[184] Having acknowledged that race-based districting is required in some circumstances by the Voting Rights Act, and having noted that such districting is probably an Equal Protection violation, Kennedy seemed poised to draw the obvious conclusion. When he did not do so, his reasoning was ominous: "But no constitutional claims were brought here, and the court's opinion does not address any constitutional issues."[185] Kennedy seemed clearly to be indicating that if constitutional questions were raised, he would have to complete his syllogism. In this way, Kennedy's opinion in *De Grandy* echoes the majority opinion in *Shaw*. But *Shaw* was addressed only to the legality of the plan before the Court, and the Court did not address the question of whether the plan about which it expressed reservations in that case was in fact required by the Voting Rights Act. Kennedy made explicit in *De Grandy* what was not addressed in *Shaw*: the extent to which a constitutional infirmity in race-based districting may in fact be a constitutional defect in the Voting Rights Act itself.

It is not inconceivable that a majority of the Court could eventually conclude that Voting Rights Act does indeed adopt a communal view of representation and that to the extent that it does, it is unconstitutional.[186] Justice O'Connor has already expressed her reservations about race-based districting in *Shaw*. Justices Thomas and Scalia

183. *Id.* at 2666.

184. *Id.* at 2667.

185. *Id.*

186. As this article was going to press, the Court's decision in *Miller v. Johnson* seemed to confirm the justices' growing uneasiness with race-based districting and with the Voting Rights Act. Justice Kennedy once again suggested that the Voting Rights Act might be unconstitutional; he did more than suggest that it would be unconstitutional as interpreted by the Justice Department, noting that "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress' authority . . . into tension with the Fourteenth Amendment." 115 S. Ct. 2475, 2493 (1995). (That "once upheld" can only be read as a reminder and a warning that Supreme Court approval of the Act is not necessarily permanent.) Once again, however, Kennedy saw no need to reach the question of the constitutionality of the Voting Rights Act. By rejecting the Justice Department's interpretation, the majority "avoid[s] the constitutional problems that interpretation raises." *Id.* It would appear that the Court prefers to reinterpret the Voting Rights Act until it no

might be willing to concede that the statute does have a broad reach, if that were a steppingstone on a path to getting rid of it altogether. It is not too far-fetched to believe that Justice Rehnquist might also adopt this view. For this reason, if for no other, those who are concerned about voting rights ought not to content themselves with the "second-best" solution of race-based districting.

D. What's Next?

(1) The End of the Road

In *Shaw, Holder,* and *De Grandy,* the Court came face-to-face with all of the limitations of the communal approach to representation. The Court did not abandon this approach, despite the urging of Justices Thomas and Scalia's to do so, but it did not show any great level of comfort with it either.[187] If communal representation is eventually to be limited, as these cases suggest, the question remains, How will we conceptualize representation instead? How will we answer the districting conundrum?

Thomas and Scalia offer a quick answer—return to individual representation (and abandon the districting conundrum)—but there is no reason to believe that individual representation will do a better job of providing representation for minorities in the next century than it did in the 1960s. Indeed, there is a good argument that the problems with individual representation that arose in cases like *Allen* arose from a fundamental flaw in this theory and that the individual theory of representation is unsuitable to a diverse, multicultural society, because its fundamental incoherence denies representation to minorities. But even if we accept that individual representation leads us to a dead end, we must still grapple with the difficulties of group representation, and with the difficulties of attempting to answer the districting conundrum. Justice Thomas is not wrong in fearing that creation of "black districts," "Hispanic districts," etc., will create new problems,

longer requires or permits race-based districting, rather than take the bolder step of striking it down. But in either case, the effect is much the same.

187. Even in *Miller v. Johnson,* decided in June of this year, the Court did not entirely abandon communal representation or race-based districting, and it seems unlikely at this point that the majority would have enough votes to do so. Justice O'Connor's concurrence emphasizes that for her, at least, the problems with race-based districting are limited to the few, what she views as exceptional, cases in which a state has acted "in substantial disregard of customary and traditional districting practices." 115 S. Ct. at 2497 (O'Connor, J., concurring). For Justice O'Connor, at least, some consideration of race in districting remains appropriate. And even Justice Kennedy's opinion leaves open, at least for now, what role racial consideration can play and what interests justify those considerations.

not least of which is the pernicious stereotyping of members of minority groups—the assumption that "they" are all alike (and different from "us"). Even the proponents of race-based districting refer to it as the "second-best" solution.[188]

What then, is the best solution? If we can neither ignore the districting conundrum *nor* answer it, what are we to do? Unless we can conjure into a being a society in which all racism magically disappears, the elimination of both individual representation and communal representation suggests that we consider a third, untried, alternative: proportional representation.

(2) Proportional Representation

Proportional representation is not one system of voting. Rather, the term proportional representation refers to any system of voting in which (1) candidates are elected from multimember districts; (2) candidates do not need to receive a plurality or a majority in order to be elected; and (3) seats are allocated in proportion to the number of votes each candidate or candidate party received.[189]

Proportional representation bears some relationship to communal representation, but with an important difference. In communal representation, the group that is represented is a racial or ethnic community, while in proportional representation, it is a community of self-selected individuals who come together for the purpose of an election. Thus, while communal representation is rigid, and must define and assign each individual to one category or another, proportional representation is fluid. Each individual chooses to align herself now with this group, then with that, depending on the circumstances. Representation is simultaneously individual and communal. Where a racial or ethnic community feels itself to be threatened communally, its members may vote communally—but they need not do so in circumstances when they do not perceive their interests to be communal. Indeed, one would expect that the degree to which voting takes place along racial lines in a proportional representation system would correspond to the degree to which the community was in fact fractured along racial lines.

Proportional representation is neither a new idea nor a particularly revolutionary one. Its logic was so compelling to John Stuart

188. *See De Grandy*, 114 S. Ct. at 2661 (quoting B. GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY (1992)).

189. *See* AMY, *supra* note 29, at 14 (1993).

Mill that he referred to winner-take-all systems as "false democracy."[190] He argued:

> Because the majority ought to prevail over the minority, must the majority have all the votes, the minority none? Is it necessary that the minority should not even be heard? . . . In a really equal democracy every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives, but a minority of the electors would always have a minority of the representatives. Man for man[191] they would be as fully represented as the majority. Unless they are, there is not equal government, but a government of inequality and privilege: one part of the people rule over the rest; there is a part whose fair and equal share of influence in the representation is withheld from them, contrary to all just government, but, above all, contrary to the principle of democracy, which professes equality as its very root and foundation.[192]

Variations of proportional representation are in use in Austria, Denmark, Sweden, the Netherlands, Germany, Switzerland, Finland, Italy, Iceland, Belgium, Ireland, Norway, Portugal, Israel, Luxembourg and Spain.[193] In Cambridge, Massachusetts, city council and school committee elections use a system of proportional representation.[194] Recently, it has been championed by Lani Guinier and others.[195] Still others have noted the connection between the problem of gerrymandering and proportional representation as a potential solution.[196]

It is not my purpose here to repeat the arguments that these advocates have made on behalf of proportional representation, nor to advocate for the adoption of any one particular system of proportional representation.[197] Rather, I wish to argue only that, given the

190. MILL, *supra* note 84, at 102-03.

191. Mill was a strong advocate of suffrage for women, so he can perhaps be forgiven for writing in the male-dominated idiom of his time.

192. MILL, *supra* note 84, at 103-04.

193. AMY, *supra* note 29, at 28.

194. *Id.* at 11.

195. *See* Guinier, *supra* note 13; *see also* Karlan, *supra* note 13; Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System,* 141 U. PA. L. REV. 1991 (1993); Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems,* 92 YALE L.J. 144 (1982) [hereinafter *Alternative Voting Systems*].

196. *See, e.g.,* Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?,* 33 UCLA L. REV. 257, 261 (1985).

197. Others have lucidly described cumulative voting, limited voting, single-transferable voting ("S.T.V."), modified S.T.V., and other variations. *See, e.g.,* AMY, *supra* note 29, at 13-20; George R. Hallet Jr., *Proportional Representation with the Single Transferable Vote: A Basic Requirement for Legislative Elections, in* CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 113, 1117-19 (Arend Lijphart & Bernard Grofman, eds.,

past failures of individual representation and the imminent failure of communal representation, proportional representation may be the only system of representation that can solve the problems of an electorate divided along racial and ethnic lines without resorting to elaborate governmental classifications of voters along these lines.

Proportional representation results neither in "political apartheid" nor in institutionalized racism. It mirrors the reality of society's divisions, without creating or institutionalizing them. It takes us outside the districting conundrum, by telling us that any group should be represented in proportion to its numbers, but that the concept of "group" is far more complex and variable than the notions of communal representation recognize.

On the other hand, proportional representation should not been seen as a panacea for all electoral ills. To begin with, no "ideal" system of proportional representation has yet been devised. Existing systems suffer from a variety of flaws, including systems that require sophisticated strategies in order to maximize voting potential,[198] systems that require sophisticated computer programs to tally the votes (which thus may be unintelligible to the electorate),[199] and systems that enhance (perhaps more than is desirable) the control of political parties.[200]

In addition, some have expressed concerns that proportional representation systems are destabilizing.[201] The argument is that by giving representation to a greater range of viewpoints, proportional representation systems give voice and legitimacy to "crackpot" views and make it more difficult for excessively diverse legislatures to accomplish anything. These arguments may be seen as antidemocratic

1984); Karlan, *Maps and Misreadings, supra* note 13, at 221-36; Inman, *supra* note 195, at 1999-2000; *Alternative Voting Systems, supra* note 195, at 148-54.

198. Cumulative voting, for example, gives each voter as many votes as there are seats and permits the voter to divide those votes in any way she chooses, all for one candidate, divided among two or more, etc. To make the most effective use of her votes, a voter will have to make sophisticated guesses about which candidates will need her to aggregate her votes, how many of her votes she should aggregate, etc.

199. I am referring here to modified single-transferable voting, which has the virtue, perhaps, of best replicating the views of the electorate, but is so complicated that voters may have little confidence in the system because they cannot understand it.

200. Party-list systems, in which voters vote for a party, the party is allocated a number of seats depending on its proportion of the vote, and the party determines who holds the seats, would seem to concentrate much greater power in the hands of political parties than exists now.

201. I am indebted to numerous members of the faculty at Western New England College School of Law, including Howard Kalodner, Anne Goldstein, and Jim Gardner, for articulating many of these arguments.

arguments, that is arguments that some people, some points of view, must be denied representation as the price of political stability. Alternatively, such arguments may be seen merely as arguments about what point in the political process minority groups should be expected to "pull, haul and trade to find common political ground."[202] Thus, the argument would go, the full panoply of viewpoints is, and should be heard, prior to elections, and the horse-trading and compromising that may be required to build coalitions among diverse groups should occur in the context of nominating and electing representatives. The business of representatives, in this view, is not to have a conversation among all the diverse views of society, but rather, having eliminated all but the most common, to go about governing in accordance with those views.[203] The assessment of such arguments is, however, beyond the scope of this article. Clearly, both the strengths and the weaknesses of proportional representation need to be more fully explored. But it appears that we have reached the time for that exploration to take place.

We have seen that the Court's voting rights jurisprudence has moved in an inchoate progression from an individual conception of representation to a group conception of representation. The group conception came to the fore as the individual approach proved unequal to the task of dealing with the racist implications of the districting conundrum. The Court's recent voting rights cases, however, suggest that, having discovered the difficulties of group representation, the Court is contemplating a return to an individual approach. Thus, to the extent that *Allen* represented the exhaustion of individual thinking about districting, *Shaw, Holder, De Grandy,* and now *Miller* may represent the exhaustion of communal thinking about districting.

However, even if the Court has correctly identified weaknesses in the communal approach to representation, that does not mean that a return to the individual approach is in order. If we are to avoid endlessly retrying solutions that have already failed, we must think about voting and representation in a new way. If *Shaw, Holder, De Grandy* and *Miller* are a signal that communal representation is faltering, then their message is that we have two choices: We can follow Justice

202. *See* Johnson v. De Grandy, 114 S. Ct. 2647, 2661 (1994).

203. Professor Karlan has argued that small legislative bodies, where representatives know each other, where voting is not anonymous, where there is an institutional setting for debate, and where voting occurs frequently, are much better settings for coalition-building and the working out of group differences than elections. Karlan, *supra* note 13, at 216-18. Moreover, the extremely low voter turnout in this country may suggest that not much pulling, hauling or trading is in fact going on at the electoral stage.

Thomas, back to an individual approach to representation that didn't work thirty years ago, or we can move forward to the twenty-first century with a new vision of representation and democracy by way of some form of proportional representation.

Conclusion

At the end of *Angels in America,* Tony Kushner provides an answer to the Angel's reactionary call: "The world only spins forward. We will be citizens. The time has come."[204] In the end, this is the answer to Justice Thomas's reactionary call as well. The court cannot work its way out of its voting rights conundrum by going backward. History and case law demonstrate that. The Court must move forward, to craft a path beyond the two dead ends it has already explored. Justice Souter's opinion in *De Grandy* is a beginning, but some form of proportional representation may well be the only road out.

204. KUSHNER, *supra* note 1, at 148 (1992).